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No. 91-1633

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SHERMAN HATCHER, Warden, Ely State Prison,
FRANKIE SUE DEL PAPA, Attorney General
of the State of Nevada,
Petitioners,

v.

HENRY DEUTSCHER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER FEDERAL COURTS MAY ENTERTAIN A SUCCESSIVE HABEAS CORPUS PETITION CHALLENGING A STATE PRISONER'S DEATH SENTENCE WHERE THE PRISONER CANNOT SHOW THAT HE IS INNOCENT OF THE OFFENSE OR ALL THE AGGRAVATING CIRCUMSTANCES, ANY ONE OF WHICH RENDERED HIM ELIGIBLE TO RECEIVE THAT SENTENCE.

2. WHETHER, UNDER THE STANDARD ADOPTED BY THE NINTH CIRCUIT FOR EXCUSING ABUSE OF THE WRIT, THE NINTH CIRCUIT MISAPPLIED THE STANDARD, THROUGH A COMBINATION OF MISSTATEMENTS AND IMPERMISSIBLE APPELLATE FACT-FINDING, IN DETERMINING THAT THE FAILURE OF TRIAL COUNSEL TO PRESENT ALLEGED MITIGATING EVIDENCE AT THE PENALTY PHASE HEARING WAS SUFFICIENTLY PREJUDICIAL TO REQUIRE A NEW PENALTY HEARING.

3. WHETHER THE APPLICATION OF NEVADA'S STATUTORY DEPRAVITY OF MIND AGGRAVATING CIRCUMSTANCE, WHICH WAS FURTHER DEFINED IN JURY INSTRUCTIONS AND HAS BEEN GIVEN A NARROWED CONSTRUCTION BY THE NEVADA SUPREME COURT, VIOLATES THE EIGHTH AMENDMENT, AND WHETHER PETITIONER'S CLAIM OF A CONSTITUTIONALLY INFIRM AGGRAVATING CIRCUMSTANCE WAS BARRED BY ABUSE OF THE WRIT.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SHERMAN HATCHER, Warden
Ely State Prison, and
FRANKIE SUE DEL PAPA, Attorney General
of the State of Nevada,
Petitioners,

v.

HENRY DEUTSCHER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW, Petitioners[1] above-named, and

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[1] One of the named petitioners, Sherman Hatcher, as Warden of the Ely State Prison, has custody of respondent Deutscher. The respondent warden below, Harol Whitley, is the former warden of the Nevada State Prison where respondent Deutscher was once housed. Respondent is now housed at the Ely State Prison. Frankie Sue Del Papa is the successor in office to former Attorney
(continued...)

file this petition for writ of certiorari seeking a reversal of the October 15, 1991, Order of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit or circuit court), whereby the Respondent's (Deutscher) death sentence was vacated.

OPINIONS AND JUDGMENTS BELOW

The Order and Dissent of the Ninth Circuit was filed on October 15, 1991. (Appendix A). The Ninth Circuit denied Deutscher's Petition for Rehearing on January 17, 1992. (Appendix B). On February 25, 1992, the circuit court entered an order staying issuance of the mandate.

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a habeas corpus petition in September of 1986. See 28 U.S.C. §§ 1331,

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[1](...continued)
General Brian McKay. The named petitioners should be substituted as parties to this action in accordance with Rule 43(c) of the Federal Rules of Appellate Procedure. Petitioners are referred to hereafter as State.

2241, 2254. Deutscher appealed following the denial of habeas relief. He received a certificate of probable cause. See id., §§ 1291, 2253. The State filed a cross appeal. The initial judgment of the Ninth Circuit was filed on August 31, 1989. The State filed a petition for writ of certiorari in November, 1989. On April 29, 1991, this Court granted certiorari, vacated the Ninth Circuit's judgment and remanded for further proceedings. The most recent judgment of the Ninth Circuit was filed on October 15, 1991. Deutscher filed a Petition for Rehearing, which was denied on January 17, 1992. This petition for writ of certiorari is filed within ninety days of the judgment of the circuit court. Sup. Ct. R. 20. The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

STATUTORY PROVISIONS INVOLVED

Because this action concerns pleadings and review of a habeas corpus matter, rules for federal habeas actions are involved. Specifically, the State contends that respondent has abused the writ in violation of federal habeas rules and is not excused from the abuse by any justifiable legal reason. See 28 U.S.C. § 2244(b) (Appendix J); Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, Rule 9(b) (Appendix K).

STATEMENT OF THE CASE

The State has lawful custody of Deutscher pursuant to a conviction for first degree murder and robbery following a 1977 jury trial in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark (hereinafter trial court or Clark County District Court). Deutscher was sentenced to death by the jury following a penalty hearing for the August 16, 1977,

murder of Darlene Joyce Miller in Las Vegas. He was also sentenced to fifteen years for robbery. The jury found three aggravating circumstances: (1) murder by a person previously convicted of a felony involving the use or threat of violence to the person of another, (2) murder committed during the commission or attempt to commit a forcible sexual assault, and (3) murder involving torture, depravity of mind or mutilation of the victim.[2]

Deutscher appealed to the Nevada Supreme Court represented by the same attorney, Deputy Clark County Public Defender Herbert "Rick" Ahlswede, who had represented him at trial. In October, 1979, the judgments of conviction and sentences of death and fifteen years in prison were affirmed. Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979) (Appendix E). In January, 1980, Deutscher, through Mr. Ahlswede, filed a

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[2] See Nev. Rev. Stat. § 200.033 (1988).

federal habeas corpus petition in Las Vegas. The court retained jurisdiction over Deutscher's petition but stayed the proceedings until he had exhausted state post-conviction remedies. Ahlswede ex rel. Deutscher v. Wolff, Case No. CV-LV-80-19-RDF, Order (D. Nev., filed April 1, 1980).

In June, 1980, Deutscher filed a state petition for post-conviction relief in the trial court. The petition was denied after the court found that the issues presented had been previously raised on direct appeal. The Nevada Supreme Court dismissed Deutscher's appeal in July, 1981. Deutscher v. State, Case No. 13121, Order Dismissing Appeal (Nev., filed July 8, 1981).

Deutscher, still represented by Mr. Ahlswede, returned to federal court and rejuvenated his pending habeas petition which was subsequently denied in August of 1982. Deutscher sought relief before the Ninth Circuit and was represented by new

counsel who filed a brief on the merits and also requested the court to remand so that other claims could be raised. The circuit court denied a remand, affirmed the denial of habeas relief, and denied rehearing. Ahlswede ex rel. Deutscher v. Wolff, 720 F.2d 1108 (9th Cir. 1983) (Appendix F). This Court denied certiorari in 1984. Deutscher v. Wolff, 469 U.S. 873 (1984).

In May, 1983, Deutscher had filed a second petition for post-conviction relief in the trial court. Action on that petition had been stayed pending the final decision on the federal habeas corpus petition. In May, 1985, an amended petition was filed alleging inter alia that Deutscher was denied the effective assistance of counsel at the penalty phase, on appeal and in post-conviction proceedings. An evidentiary hearing was held and the petition was ultimately denied in November, 1985. The Nevada Supreme Court affirmed the denial of

post-conviction relief. Deutscher v. Warden, Nevada State Prison, 102 Nev. 388, 724 P.2d 213 (1986). (Appendix G).

Deutscher immediately filed his second federal habeas corpus petition in September of 1986. The State moved to dismiss on the basis of abuse of the writ and procedural default. It also addressed the merits of the claims submitted by Deutscher. The district court eventually issued rulings on various issues on November 20, 1986, April 1, 1987, June 25, 1987, October 22, 1987, December 17, 1987 and March 23, 1988. The June 25 order followed an evidentiary hearing on procedural default and the March 23 order followed an evidentiary hearing on the claim of ineffective counsel. Three of the orders were published with the last order being the final judgment denying habeas relief. See Deutscher v. Whitley, 663 F.Supp. 793 (D. Nev., 1987); 671 F.Supp. 1264 (D. Nev., 1987); 682 F.Supp. 1098

(D. Nev., 1988) (Appendices D, H and I). A certificate of probable cause was granted after Deutscher filed a notice of appeal and the State filed a notice of cross-appeal.

Following full briefing and oral argument, the three-judge panel reversed the denial of a writ of habeas corpus, concluding (1) that Mr. Ahlswede erred by having failed to present alleged mitigating evidence at the capital sentencing hearing and (2) that the error was prejudicial. The circuit court denied relief in all other respects, including guilt, but determined that there was no abuse of the writ. In essence, it also ruled that even though its application was harmless error, Nevada's "depravity of mind" aggravating circumstance was unconstitutional. Deutscher v. Whitley, 884 F.2d 1152 (9th Cir., 1989) (Appendix C). Deutscher did not appeal but the State did. In April, 1991, the State ultimately obtained a writ of certiorari from this

Court. This Court remanded the case to the Ninth Circuit for further proceedings.

On October 15, 1991, a unanimous three-judge panel concluded that under intervening precedent, McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454 (1991), Deutscher had abused the federal writ of habeas corpus. The unanimous panel ruled on the applicable standard to excuse an abusive petition; but the panel was divided over whether Deutscher's death sentence should be vacated. (Appendix A). Deutscher filed a Petition for Rehearing which was denied on January 17, 1992. (Appendix B).

The State now seeks review of the circuit court's Order.

SUMMARY OF THE ARGUMENT

There are several and important reasons for granting the writ. Although the circuit court correctly determined that Deutscher abused the federal writ of habeas corpus, it improvidently ruled that his abuse should be

excused under an erroneous miscarriage of justice standard. The decision by the Ninth Circuit is in conflict with the decisions of the United States Courts of Appeal for the Fifth and Eleventh Circuits, respectively.

Even if it is assumed that the Ninth Circuit adopted the correct standard, the majority of the three-judge panel misapplied the standard to the facts of the case, thus establishing a legal precedent in the Ninth Circuit whereby the court engages in wholesale, impermissible appellate fact-finding contrary to the holdings of this Court. The Ninth Circuit misstated the record, made findings of fact and grounded its most recent ruling in "facts" which were not supported by the record. Its impermissible findings were contrary to the findings of the district court and led to the erroneous legal conclusion that attorney error was actually prejudicial and legally reversible.

Finally, the circuit court erroneously struck down Nevada's aggravating circumstance of depravity of mind as violative of this Court's holding in Godfrey v. Georgia, 446 U.S. 420 (1980). The claim should have been barred by abuse of the writ because, while it was raised on direct appeal, the claim was not raised in the first federal habeas proceeding. Moreover, the substantive ruling is in conflict with this Court's decisions and those of the Nevada Supreme Court. The depravity of mind aggravator was adequately defined in the jury instructions given to Deutscher's jury such that the jury's discretion was properly channeled. Also, the court refused to consider Nevada's narrowed application of the aggravator. The rulings of the Ninth Circuit, if allowed to stand, would seriously undermine the ability of the states within the Ninth Circuit's jurisdiction to obtain finality, rulings

consistent with the record and rulings in harmony with those of this Court and other federal circuits in capital litigation.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LAW IN A WAY WHICH CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS BY NOT LIMITING APPLICATION OF THE MISCARRIAGE OF JUSTICE STANDARD TO THOSE INSTANCES WHERE A PETITIONER (1) IS ACTUALLY INNOCENT OF THE CRIME OR ALTERNATIVELY, (2) WHERE HE IS ACTUALLY INNOCENT OF ALL AGGRAVATING CIRCUMSTANCES ANY ONE OF WHICH MADE HIM ELIGIBLE FOR THE DEATH PENALTY. ASSUMING THE NINTH CIRCUIT ADOPTED THE CORRECT STANDARD FOR JUDGING WHEN A MISCARRIAGE OF JUSTICE HAS OCCURRED, THE CIRCUIT COURT DECIDED AN IMPORTANT QUESTION OF LAW IN SUCH A MANNER AS TO REQUIRE INTERVENTION BY THIS COURT WHERE IT MISAPPLIED THE STANDARD ADOPTED.

The central issue in this case is whether at some point in time and under what circumstances, the federal courts must allow the state court criminal justice process to function in death penalty cases. Since 1988 in this case, the Ninth Circuit has frustrated that process by (1) refusing to find an abuse of the writ or (2) excusing

Deutscher for having abused the writ. The State once again is asking this Court to order the Ninth Circuit to discontinue its erroneous legal intervention which has inappropriately prohibited the State from executing Deutscher.

Until this Court decided McCleskey v. Zant, 499 U.S. ____, 111 S.Ct. 1454 (1991), the Ninth Circuit had, in essence, refused to find the death penalty litigant in this case subject to the abuse of the writ bar. Deutscher v. Whitley, 884 F.2d 1152 (1989). At least until 1991, the doctrine of abuse of the writ was a dead letter in the Ninth Circuit, Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988), cert. denied sub nom. Demosthenes v. Neuschafer, ___ U.S. ___, 110 S.Ct. 264 (1989)(pursuant to circuit precedent, death row inmate with every incentive to think up new claims may engage

in piecemeal litigation).[3]

Following this Court's remand almost a year ago, the three-judge panel in this case unanimously concluded that under the standard set forth by this Court in McCleskey v. Zant, 499 U.S. ____, 111 S.Ct. 1454 (1991), the State had sufficiently pleaded and shown an abuse of the writ. The panel unanimously concluded that Deutscher was unable to establish cause for his failure to raise either (1) his claim of ineffective assistance of counsel or (2) the existence of an invalid aggravating circumstance, in his prior federal habeas petition. It expressly rejected his claim that Mr. Alshwede's "ineffective"

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[3] The Ninth Circuit has yet to expressly disavow or overrule Neuschafer since McCleskey. In Neuschafer the Ninth Circuit indicated that there is no abuse of the writ even when a habeas petitioner (1) deliberately withholds from his first petition claims which have not yet been exhausted in state court and (2) subsequently raises those claims in the second federal habeas petition after exhaustion.

representation during the first federal habeas petition established cause. Coleman v. Thompson, 499 U.S. ___, 111 S.Ct. 2546 (1991).

Nevertheless, the panel unanimously concluded that Deutscher could be excused under the "fundamental miscarriage of justice" exception, thus eliminating the requirement to show both cause and prejudice. The panel reasoned that because alleged constitutional violations at his trial "more probably than not resulted in a capital sentence for one who should not have been sentenced to death," he should not face the abuse of the writ bar. In a fragmented decision, two of the three judges then decided Deutscher is entitled to a new penalty hearing where a new jury would hear alleged mitigating evidence not proffered in 1977.

The State challenges the Ninth Circuit's adoption of an overly broad standard by

which it found a fundamental miscarriage of justice. The State expressly asks this Court to resolve the obvious conflict among no less than four federal circuit courts of appeal, regarding the contours of the exception.

The Ninth Circuit, following the lead of the Eighth Circuit, adopted a standard for fundamental miscarriages of justice which states "'If the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment,'" citing Stokes v. Armentrout, 893 F.2d 152, 156 (8th Cir. 1990). The Ninth Circuit juxtaposed this against the standard urged by the State, one which by the time of the most recent order below, had been adopted in the Eleventh Circuit. The Ninth Circuit categorized the State's preferred standard as a "more restrictive approach." The preferred standard states:

> The sentenced defendant must demonstrate not merely that the error affected the sen- tencing outcome but that the error resulted in a sentencing outcome for which the defendant is not eligible by virtue of his conduct . . . That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty.

Citing, Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (en banc).

Of course, the Fifth Circuit, subsequent to the holding in Johnson, issued its opinion in Sawyer v. Whitley, 945 F.2d 812 (5th Cir. 1991), in which it adopted the Johnson standard. As this Court is well aware, it entertained oral arguments by the respective parties in Sawyer v. Whitley in February, 1992. Thus, in all likelihood, this Court's disposition of the Sawyer case will significantly affect if not totally dispose of the issues in this case as well.

Just as the Louisiana state respondents, the United States and other amicus curiae parties in the Sawyer case have proffered

compelling arguments on the merits, so too the State of Nevada requires similar consideration of its substantive arguments. While the following is not an exhaustive list of considerations or arguments that the State intends to proffer, the following is a fair summary of reasons this Court should consider Nevada's case.

First, the standard adopted by the Ninth Circuit essentially substitutes a pure prejudice inquiry in place of the present cause and prejudice inquiry that this Court has previously deemed appropriate for consideration of successive petitions. Finality, a heretofore abstract if not altogether nonexistent quantity in Ninth Circuit death penalty jurisprudence, would suffer even more should the Ninth Circuit's standard go unreviewed.

Moreover, should the Ninth Circuit's standard go unaddressed and uncorrected, Nevada and presumably all the death penalty

states in the Ninth Circuit, would then be burdened with what is, in essence, a federal court process of reevaluation and reweighing of evidence; and the substitution of federal judicial opinions on what is largely a subjective determination, i.e. an appropriate sentence. Such intervention would fail to correct what this Court has already ruled out -- a requirement that the federal courts "peer majestically" over the shoulders of state sentencers to second-guess their interpretation of the facts. Lewis v. Jeffers, 497 U.S. ___, 110 S.Ct. 3092 (1990). The Ninth Circuit has second-guessed Deutscher's sentencers under the legal guise of purportedly new or formerly undiscovered "mitigating evidence" not proffered in the first penalty hearing. The amorphous if not totally unworkable standard adopted by the Ninth Circuit surely will lead to more uncertainty as well as increased rounds of federal habeas corpus

litigation by death penalty inmates in Nevada and elsewhere who, as noted by Circuit Judge Hall in the now discredited Neuschafer case, supra, have every reason to create piecemeal litigation with the hope of delaying the ultimate infliction of the sentences imposed upon them. Not only is the Ninth Circuit's holding important to Nevada in this particular case, the Court's adjudication of Deutscher's case is equally important to the other death penalty states[4] within the jurisdiction of the Ninth Circuit, which also are bound by the circuit court's decision.

The fact that this Court has agreed to resolve an identical circuit conflict by deciding the Sawyer case virtually mandates that the Court hold the State's Petition for Writ of Certiorari in this case until such time as it has adjudicated the Sawyer

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[4] Arizona, California, Idaho, Montana, Oregon and Washington.

matter. At the point in time when this court rules in favor of the Louisiana respondents in Sawyer, it should grant certiorari to the State on this issue as well as the other issues addressed in the following argument sections.

II. THE NINTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF LAW IN A WAY WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL BY MISSTATING THE RECORD, ENGAGING IN IMPERMISSIBLE APPELLATE FACT-FINDING AND DETERMINING THAT THE FAILURE OF TRIAL COUNSEL TO PRESENT ALLEGED MITIGATING EVIDENCE AT THE PENALTY HEARING WAS PREJUDICIAL.

Another disturbing aspect of the circuit court's recent order which actually resulted in the second reversal of the district court's denial of the writ of habeas corpus was the determination that Deutscher had shown prejudice resulting from the failure of his trial counsel to investigate and present mental disorder evidence at the sentencing hearing in 1977. The circuit court's decision was contrary to the decision of the district court, the state

supreme court, and the state post-conviction court. The decision is grounded on obvious errors of law. The circuit court ignored facts favorable to the state which should have been accorded a presumption of correctness, and it engaged in a factfinding role contrary to law. Amadeo v. Zant, ___ U.S. ___, 108 S.Ct. 1771 (1988).

First, the claims of ineffective assistance of counsel should have been barred by abuse of the writ as discussed above. Deutscher claimed that his trial counsel failed to present certain mitigating evidence at his sentencing hearing. He did not raise this claim in his first federal habeas petition. Certainly, Deutscher was represented during the first federal habeas proceedings by his trial counsel but, as conceded by the entire panel, this does not suffice as "cause" to excuse the abuse under Coleman, supra.

Even if the State conceded that the Ninth Circuit adopted the correct standard for excusing abuse of the writ, Deutscher still should not have been granted relief below. This is because, as dissenting Circuit Judge Hall noted, a new jury probably would not return a verdict of anything other than death even when it hears the "mitigating evidence" that Deutscher claims and the circuit judges agreed should have been presented. Unfortunately, this case is tainted by the ill-conceived venture into factfinding by the entire federal circuit court panel. It is rather obvious from a review of the relatively short Order of the majority that they once again relied on their own inaccurate review of the record done in their misguided role as super majestic factfinders. Inasmuch as this Court vacated the first order only to have it readopted, at least by a majority below, the State is once again constrained to point

out several errors which existed in the 1989 decision.

Several factors contributed to the Ninth Circuit's recent erroneous ruling regarding ineffective assistance, not the least of which was the circuit court's ruling on the admissibility of testimony by a state-appointed psychiatrist at the federal evidentiary hearing and in the determination that Deutscher proved prejudicial attorney error. See Strickland v. Washington, 466 U.S. 668, 687 (1987). The following review will show that the lower court virtually reweighed "facts" sufficient to suit its apparent purpose i.e., eliminating the death sentence, by requiring belated consideration of subjective "mitigating" factors, rather than considering only whether all objectively based aggravating factors were valid.

A. Ineffective Counsel Claims and Evidence Presented at the Hearings.

Deutscher made several claims that his trial counsel was ineffective for having failed, inter alia, to investigate or present mitigating evidence during the penalty phase of the trial. Of the approximate seventeen claims of attorney error, five were allegations of a failure investigate or present mitigating evidence The State must concede that Deutscher's trial counsel unreasonably failed to investigate Deutscher's mental history background, a fact found by the federal district court. See Deutscher v. Whitley, 682 F.Supp. at 1103. The State has argued all along, however, that the failure to investigate or present mitigating evidence of this nature was not prejudicial. Even dissenting Circuit Judge Hall opined it ultimately was not. Deutscher's primary claims were that, had his background been investigated, his trial counsel would have

found that Deutscher suffered from mental illness, had been involuntarily civilly committed at various times in 1963 and had been diagnosed as a paranoid schizophrenic. Further asserted "mitigating" evidence not discovered was that Deutscher was born substantially premature as a result of a beating his mother received from his father, that he was beaten frequently by his father, that he was slow in school, nervous and a loner, that he was generally nonviolent and easygoing but had trouble when he drank, that he treated his family well, and that he could not have intended to kill. As such, allegedly it was not unusual for such a person to develop the mental problems Deutscher supposedly had and to develop symptoms which would include uncontrollable explosions of violence, an inability to control his actions, and a failure to be conscious of what he is doing. Deutscher claimed that stress and alcohol to which he

was purportedly subjected in this case, increased susceptibility to an extreme outburst.

At the state post-conviction and federal habeas corpus hearings, Deutscher's counsel presented some of Deutscher's hospital records from the State of New York during a stay in 1963. He had been diagnosed as having "schizophrenia, paranoid type" with apparently uncontrollable outbursts of anger. There appeared in the records to have been an abnormal electroencephalogram (EEG). Some of the records indicated that the diagnosis was associated with alcoholism and pathological intoxication. These records were obtained by post-conviction counsel and were relied upon in the post-conviction hearings by a psychiatrist, Dr. William O'Gorman, who had examined Deutscher upon his arrest in 1977. At the 1985 state post-conviction hearing, Dr. O'Gorman responded to several

hypothetical questions and, based upon personal history provided in the form of hypotheticals or by Deutscher and his family, gave an opinion that Deutscher may have been suffering from a mental disturbance at the time of the commission of the crime in 1977. He did, however, state that the problem in 1963 may have been resolved with treatment.[5]

Dr. Franklin D. Master had also examined Deutscher in 1977. An affidavit of Dr. Master was submitted at the 1985 state post-conviction hearing, in which Dr. Master

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[5] An additional important fact here is that all of the psychiatric evidence presented by DEUTSCHER could only be potentially helpful if the facts surrounding the crime in 1977 showed that he was intoxicated or had been taking drugs such that his "uncontrollable" explosion of violence would have been more likely to occur. But there was testimony at trial and during the habeas proceedings to prove that DEUTSCHER had taken no drugs and was not intoxicated. Therefore, the statement by the Ninth Circuit that Dr. O'Gorman "would have testified that stress and alcohol can make such an outburst more likely and that DEUTSCHER's story that he had blacked out was consistent with the symptoms of this disorder," was without basis.

opined that the original diagnoses of schizophrenia found in the 1963 New York medical records would not have been the original diagnoses if the psychiatric profession in 1963 had possessed the knowledge it has today. Dr. Master stated that the diagnoses would have been "toxic psychosis" as the treatment was for behavioral problems brought on my alcoholism. The fact that an EEG administered to Deutscher in 1963 was abnormal did not appear significant to Dr. Master given Deutscher's alcohol addiction. Subsequent records indicated that this problem was corrected. Dr. Master stated that had he had access to these and other records at the time he made his evaluation of Deutscher in 1977, his opinion would have been the same that Deutscher was not suffering from any organic brain disease during the commission of the crimes and that Deutscher "has an anti-social personality

and that he is a dangerous man."

The first important point here with regard to the Ninth Circuit's latest majority opinion is that neither Dr. O'Gorman nor Dr. Master testified in the 1977 trial. Early in the case, both psychiatrists were appointed at the request of the defense to examine Deutscher for competency and sanity. Both doctors determined that Deutscher was competent and sane. As a result of this, defense counsel at the time decided there would be no insanity defense.

The testimony of Dr. O'Gorman was presented by Deutscher's post-conviction counsel during state proceedings in 1985. The affidavit of Dr. Master was presented by the State at that time and the testimony of Dr. Master was later presented during the 1988 federal habeas corpus evidentiary hearings. The State had also obtained and presented at the federal evidentiary

proceedings New York court records relating to Deutscher's 1968 conviction for rape and sodomy. These records consisted of the sentencing transcript, the police report, the pre-sentence investigation report, the transcript of Deutscher's testimony, and Deutscher's New York Prison psychiatric records following his incarceration in that state. None of these records had been obtained by Deutscher's post-conviction counsel to that date but these records were relied upon by Dr. Master in his testimony and by the federal district court in finding that no prejudice had inured to Deutscher in the failure of his trial counsel to investigate his mental history. None of these records were either seen or relied upon by Dr. O'Gorman in 1977 or in 1985.

B. The Circuit Court Erroneously Rejected Consideration of the Testimony of a Psychiatrist Presented in the Federal Habeas Proceedings.

The Ninth Circuit's 1989 opinion, apparently adopted by the majority again in 1991, stated, among other things,

> Moreover, much of Dr. Master's testimony would have been inadmissible at the penalty phase hearing. Dr. Master was appointed by the trial court to determine Deutscher's competence to stand trial. When "a psychiatrist designated by the trial court to conduct a neutral competency examination" goes beyond simply reporting on competence and testifies at the penalty phase, he becomes like "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and use of his testimony could violate the Fifth Amendment. Estelle v. Smith, 451 U.S. 454, 467 (1981).

Deutscher v. Whitley, 884 F.2d at 1161 (emphasis added). This holding by the Ninth Circuit was erroneous when made and is no less erroneous now.

The opinion of the Ninth Circuit that Dr. Master's testimony "could violate the Fifth Amendment" was irrelevant here as well as incorrect. Dr. Master did not testify at

the penalty phase and would not have been called unless the defense strategy was to establish a "mental status" defense with psychological evidence. In this situation, the rule in Estelle v. Smith, 451 U.S. 454 (1981), would not be violated. Buchanan v. Kentucky, 483 U.S. 402, 421-24 (1987). Moreover, it was defense counsel who, in 1977, requested the psychiatric evaluations by these doctors. To the extent that in either 1989 or 1991 the Ninth Circuit relied on Estelle in dismissing the testimony of Dr. Master from consideration in these habeas proceedings, the reliance was clearly in conflict with the decisions of this Court and other circuit courts. See Woomer v. Aiken, 856 F.2d 677, 679-82 (4th Cir. 1988), cert. denied, 109 S.Ct. 1560 (1989); Riles v. McCotter, 799 F.2d 947, 953-54 (5th Cir. 1986). There is no question that psychiatric testimony can be presented if it is in accordance with the requirements of

Estelle v. Smith. See Barefoot v. Estelle, 463 U.S. 880, 896-904 (1983).

Additionally, this psychiatric testimony of Dr. Master was presented in a habeas corpus setting. Habeas corpus is civil in nature. See Hilton v. Braunskill, 107 S.Ct. 2113, 2118 (1987). As such, the presentation in these habeas proceedings of the testimony of Dr. Master did not violate Deutscher's fifth or sixth amendment rights. See Allen v. Illinois, 478 U.S. 364 (1986).

C. The Circuit Court Misstated the Record and Made Factual Findings Not Supported by the Record.

The remaining error in the Ninth Circuit analysis was with regard to what Dr. Master did say in his testimony. The federal district court had determined that trial counsel's deficiencies in not obtaining Deutscher's mental health history were not prejudicial. The Ninth Circuit, on the other hand, said,

> Dr. Master testified that Deutscher was not mentally ill, but rather had

> no social conscience. The court speculated that the jury might have considered this lack of social conscience testimony as further aggravation. Dr. Master's testimony might have been successfully rebutted. Dr. Master did not take into account Deutscher's premature birth, fetal injury, or childhood beatings. Dr. Master admitted that Deutscher would do well in an institutional setting. In addition, Dr. Master might have been impeached by evidence that Dr. Master has been an overzealous prosecution witness in other murder trials.

Deutscher v. Whitley, 884 F.2d at 1161.

Once again the Ninth Circuit majority has speculated and misread the record. First of all, Dr. Master was specifically asked to assume that there would have been testimony in 1977 that Deutscher was born substantially premature as a result of beatings his mother received from his father, that Deutscher "was beaten frequently from his father, he was slow in school, nervous, [a] loner, had trouble when he drank," that he was generally nonviolent and easygoing but had trouble when he drank, and that he treated his family well and

could not have intended to kill. Transcript of Proceedings of January 6, 1988 at 101. The doctor specifically stated that those facts would not be consistent with his opinion of Deutscher's status in 1977 as history from independent sources appeared to indicate a repeated history of violent aggressive behavior toward persons close to Deutscher and in his family as well as to outsiders. Even though he may have had disagreement with these facts, if they had been established, Dr. Master stated that his original opinion would still stand.

Nor is it correct to say that the record showed that "Dr. Master admitted that Deutscher would do well in an institutional setting." In fact, Dr. Master was relying on the 1968 New York criminal court records and the statements of the judge at the time of sentencing to support his conclusions.

Dr. Master was referring to Deutscher when he said,

> That he is an individual that grew up in a household with a great deal of violence and battering and one point it was mentioned [sic] his mother used a frying pan to batter the father in the head and that there was an assault and battery in Florida and both of the first two marriages ended because of repeated batterings of wives and then the violent assault that led to the conviction of sexual sodomizing assault [sic] on a teenage high school girl in New York in which the judge at the sentencing produced a very strong condemning lecture directed towards Mr. Deutscher and then that coupled with the 1977 charge that there seemed to be a general pattern of continued sporadic violence and coupled with a reporting of Mr. Deutscher as well behaved and meek and mild mannered within a confinement setting which again is not atypical with the diagnoses of antisocial personality. That given an individual smaller and weaker and helpless and the freedom to act on them, violent aggression to dominate will come out.
>
> Faced with overwhelming authority and the lack of opportunity to be violent, the individual submits. Far from being mental illness, that's really pretty adaptive behavior. It's antisocial behavior, it's behavior that doesn't conform to social value systems of a civilized, orderly society but it's not considered mental illness.

Id. at 94-95. Additionally, when directly asked to discuss the opinion of an asserted attorney expert previously called by Deutscher's counsel, Dr. Master talked about Deutscher's adjustment to his institutionalization:

> Well, I think that certainly in his institutionalization there currently he's in maximum security and I'm not certain that he has all that much opportunity to become sexually and physically aggressive with a relatively defenseless female.

Id. at 96. Finally, Dr. Master was asked about his view of some of the statements in the New York prison records to the effect of Deutscher making a good institutional adjustment with a good prison record: "I think that all we can do is to accept that part of it as their stated observations that his behavior within confinement was good behavior." Id. at 97. Thus, at no time did Dr. Master admit that Deutscher would do well in an institutional setting.

Most disturbing is a statement by the

Ninth Circuit: "In addition, Dr. Master might have been impeached by evidence that Dr. Master has been an overzealous prosecution witness in other murder trials Deutscher v. Whitley, 884 F.2d at 1161. There was no evidence whatsoever presented at the federal habeas evidentiary proceedings or in any other part of the record to support this kind of determination. As a matter of fact, at the federal habeas evidentiary hearing, Dr. Master testified that he had previously had occasion to testify for both the prosecution and the defense on various occasions.

As with most of the other so-called "factual" findings made by the Ninth Circuit, this statement that Dr. Master might have been impeached appears also to have been taken from Deutscher's opening brief to that court. In that brief, Deutscher cited two Nevada Supreme Court cases which held that it was improper for

Dr. Master in those specific cases to have been allowed to testify as to admissions made by the defendant during a psychiatric examination or to state his opinion as to the credibility of a defendant he had interviewed. See Winiarz v. State, 104 Nev. 43, 752 P.2d 761 (1988); McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982). In the 1982 case, the state supreme court found a violation of the rule announced in the 1981 Supreme Court case of Estelle v. Smith. In the 1988 case, the state supreme court found that the trial court erred in allowing the doctor to testify over objection to the state of mind of the defendant and as to her credibility. The court also relied on the previous decision in McKenna. Thus, both decisions related to evidentiary rulings. There was and is no evidence supporting the finding of the Ninth Circuit that Dr. Master was "an overzealous prosecution witness in other murder trials."

D. The Facts Support the District Court Finding of No Prejudice.

The Ninth Circuit took it upon itself i
this case to make factual findings not
supported by the record and totally contra
to the findings of the lower district cour
The federal district court stated:

> The substantial weight of the psychiatric evidence presented to this Court indicates that the petitioner is not mentally ill, and that he instead lacks a social conscience. The Court is aware that the petitioner need not have been diagnosed as having a full fledged mental illness in order for the psychiatric evidence to help avoid the death penalty. In this case, however, it appears that the evidence would have stood an equal chance of harming the petitioner's case more than it helped. A jury, presented with evidence tending to show that the petitioner was abused as a child, and that he failed to develop normal social senses, could easily find that these facts did not outweigh the aggravating circumstances presented by the state. Indeed, it seems likely that telling the jury that the petitioner lacks a social conscience is likely to be found as an aggravating circumstance itself. . . . In light of the extremely equivocal nature of the psychiatric evidence which the jury in this case would have heard, the Court cannot say that there is a reasonable probability that the outcome of the penalty phase hearing

> would have been different had the evidence been produced.

Deutscher v. Whitley, 682 F.Supp. at 1104 (citing cases). What the circuit court has now done in making findings contrary to the district court is to "engage in impermissible appellate fact finding." Amadeo v. Zant, 108 S.Ct. 1771, 1780 (1988). See Fed. R. Civ. P. 52(a). The circuit court completely misstated the record and even relied on alleged facts not presented to the district court contrary to cases decided by this Court.

Finally, it is important to note that the overwhelming evidence presented by the State demonstrates that the lack of investigation by Deutscher's trial counsel was not prejudicial, even under the Ninth Circuit's miscarriage of justice standard. The most damaging evidence was the documentary evidence the State presented. As noted above, Deutscher was treated at a New York Hospital in 1963. The documents from

Deutscher's 1968 criminal case, in which he was convicted of attempted rape, attempted sodomy and assault, indicate that Deutscher underwent a mandatory examination of his mental condition by two psychiatrists who were to provide written reports prior to imposition of sentence. In the sentencing transcript, the court referenced the examination previously conducted by the psychiatrists, noted Deutscher's prior prison stays and trouble in and outside of New York and stated, "Your general community history is rather poor." Finally, the court, in sentencing Deutscher to ten years in prison for the attempted sodomy and five years on the assault, stated, "As far as I'm concerned, Mr. Deutscher, you are a violent person, you're a danger to the community to be left at large."

The police report regarding the 1967 New York offense showed that Deutscher had thrown the female victim to the ground,

ripped open her blouse, attempted to pull down her bra, unzipped his pants and tried to force the victim to perform an unnatural act. Deutscher subsequently slapped the victim across the face, punched her over her eye and inflicted lacerations. These are facts very similar to what happened to Deutscher's victim in 1977.

The pre-sentence investigation report also related the facts of the 1967 New York case as well as Deutscher's previous court and institutional record. The social history of the offender indicated that his father appeared to be a "beater" and beat his mother, Deutscher and his sister. With regard to mental condition, the report referenced Deutscher's admission to the state hospital in 1963. The report showed that Deutscher had beaten both his first and second wives.

Finally, the final report in the psychiatric records from the New York

Department of Corrections from 1968 until 1973 indicated that Deutscher disclosed no evidence of any psychiatric disorder. The reports of several other psychiatrists diagnosed him as having an alcoholic addiction and personality disorder. One psychiatrist even referred to the prior New York hospitalization and stated "in retrospect it seems somewhat doubtful that the diagnoses as established at Pilgrim had been very well substantiated." None of this information was available to Dr. O'Gorman for his 1985 testimony and, in fact, Deutscher's habeas counsel had not obtained this information.

Thus, the factual findings made by the district court are well substantiated by the record. The reweighed factual findings made by the Ninth Circuit are not supported by the record and are inconsistent with the findings made by the federal district court. The circuit court acted contrary to the

rulings of this Court in making these findings. The circuit court, unlike the district court, also acted contrary to the decisions of this Court and other circuits in finding prejudice from the failure to present alleged mitigating evidence.[6] Even under the Ninth Circuit's liberal standard for excusing abusive writs, consideration of some or all of the mitigation evidence could not alter the probable outcome.

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[6] See Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987) (no prejudice from failure to present evidence of child abuse and injury to head or psychiatric testimony of organic brain dysfunction causing inability to control extreme impulses in light of negative information that would have accompanied the evidence); Thompson v. Wainwright, 787 F.2d 1447, 1454 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987) (evidence of difficult youth, unsavory codefendant and limited mental capacity would not have altered jury decision in light of evidence of defendant's participation in brutal torture murder).

III. THE NINTH CIRCUIT HAS DECIDED TWO IMPORTANT QUESTIONS OF LAW WHICH CONFLICT WITH THE DECISIONS OF THIS COURT BY HOLDING THAT NEVADA'S DEPRAVITY OF MIND AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT AND THAT THE CLAIM WAS NOT BARRED BY ABUSE OF THE WRIT. THE NINTH CIRCUIT'S DECISION ON THE DEPRAVITY ISSUE IS ALSO IN CONFLICT WITH THE DECISIONS OF THE NEVADA SUPREME COURT.

The error committed by the Ninth Circuit in its holding that Deutscher was excused from abusing the writ was magnified by the circuit court's finding that Nevada's depravity-of-mind aggravating factor was unconstitutional. The particular claim was presented by Deutscher in his direct appeal to the state supreme court and omitted from his first federal habeas petition. The Nevada Supreme Court had reached the issue on direct appeal. Deutscher v. State, 95 Nev. at 677, 601 P.2d at 412-13 (Appendix E). There was simply no excuse for the failure to raise the claim in the first federal habeas petition.

Then, the circuit court decided the issue incorrectly and in a manner which conflicts with (1) this Court's opinion the Lewis v. Jeffers, 497 U.S. ___, 110 S.Ct. 3092 (1990) and (2) various Nevada Supreme Court holdings as well.

In 1989, the circuit court addressed this issue when it superficially relied upon previous decisions of this court, Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988); Godfrey v. Georgia, 446 U.S. 420, 427 (1980), to invalidate the depravity of mind aggravating circumstance. This Court remanded the case for further consideration in light of the intervening opinion in Lewis. The circuit court's summary treatment of this issue on remand, which failed to even consider the Nevada Supreme Court's narrowing construction of the statute, further demonstrates the need for this Court to grant certiorari.

A. The Challenge to the Torture, Depravity of Mind or Mutilation Aggravating Circumstance was Barred by Abuse of the Writ.

Deutscher's fourth claim in his second federal habeas petition challenged the constitutionality of this aggravating circumstance and relied upon Godfrey. The State, in its motion to dismiss, specifically claimed that this issue was barred by abuse of the writ, pointing out that it had been raised on direct appeal but not in the first federal habeas petition. The district court order of November 20, 1986, asked for further briefing by the parties solely on the issue of procedural default of the numerous claims. Deutscher's brief filed in December of 1986, pointed out that this specific issue was not barred by procedural default because it had been raised on direct appeal. The State's reply filed on January 12, 1987, acknowledged that procedural default did not bar this issue but again noted that the issue was barred by

abuse of the writ. The district court order of April 1, 1987, discussed procedural default and any possible excuse by a showing of cause and prejudice only with respect to the claims raised in Counts 1 through 3 and 5 through 10. None of the remaining district court orders discussed abuse of the writ in any form, especially with regard to claim number 4.

In its cross-appeal to the Ninth Circuit, the State specifically claimed that the lower court failed to rule on the abuse-of-the writ defense asserted by the State. In 1989, the circuit court summarily rejected the State's position. It was only by the order of this Court in 1991 that the Ninth Circuit reconsidered and ultimately changed its general ruling on the abuse of the writ issue generally. However, as explained previously, the circuit court then excused Deutscher's abusive practice, and sustained his challenge anyway.

The reasons outlined in argument section I above, are the same reasons this Court should grant certiorari to consider whether (1) this claim is subject to the abuse of the writ bar and (2) is not saved by operation of the correct miscarriage of justice exception adopted by the Fifth and Eleventh Circuits.

B. The Circuit Court's Ruling that the Depravity of Mind Circumstance was Vague is Contrary to the Decisions of this Court and Conflicts With The Narrowing Construction Commenced by the Nevada Supreme Court.

One of the circumstances by which murder of the first degree may be aggravated in Nevada, such that death may be imposed is that the murder "involved torture, depravity of mind or the mutilation of the victim." Nev. Rev. Stat. § 200.033(8) (1988). At the end of the circuit court's 1989 opinion, the court concluded that, while the "torture and mutilation aspects of this circumstance are sufficiently clear and objective to satisfy the requirements of Godfrey," the "depravity

of mind instruction . . . fails to meet Godfrey requirements." (Appendix C). On remand, the circuit court merely opined that "nothing in Lewis v. Jeffers, 497 U.S. ___, 110 S.Ct. 3092 (1990), leads to a contrary conclusion [that the instruction as applied was not unconstitutionally vague]."

On direct appeal in 1979, the Nevada Supreme Court noted that the trial court had "meticulously defined for the sentencing panel" the relevant terms of torture, depravity and mutilation. The specific instructions were cited in a footnote. (Appendix E). The circuit court later agreed, with regard to mutilation, stating that the "cutting off or destruction of a portion of the body (mutilation) is an objective difference between a murder by mutilation and any other murder." (Appendix C). With regard to torture, the circuit court determined that "[i]ntent to cause cruel pain and suffering for sadistic

purposes is a similarly objective and reviewable distinction." Id. The circuit court could not agree that the depravity of mind instruction met Godfrey requirements. The court erroneously stated that there was nothing in the definition which restrained "arbitrary imposition of the death penalty. . . . The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the 'especially heinous, atrocious, or cruel' instruction rejected in Maynard or the 'outrageously or wantonly vile, horrible or inhuman' instruction in Godfrey." Id.

Nevertheless, in 1989, the circuit court determined that, because the jury found two aggravating circumstances in addition to the torture, depravity of mind or mutilation circumstance, the court would affirm had it not decided to reverse on the basis of ineffective counsel. Then, in 1991, the circuit court changed its approach and

decided that the combination of Mr. Ahlswede's ineffective representation and the jury's consideration of an unconstitutionally vague aggravating circumstance necessitated reversal under the miscarriage of justice exception.

The State is aggrieved by the ruling for several reasons. First, the State is required to hold another penalty hearing to decide Deutscher's sentence for a crime committed in 1977. Second, the federal court in the District of Nevada has applied the Ninth Circuit's Deutscher analysis in at least one other case, McKenna v. Godinez, Case No. CV-S-90-785-PMP(LRL), and presumably will be conby circuit precedent to do so in other cases. Third, the Ninth Circuit's holding does violence to the concept of comity inasmuch as it fails to recognize the Nevada Supreme Court's narrowing construction which presently governs Nevada cases in Nevada courts.

Quite simply the circuit court ruling is incorrect. The depravity of mind circumstance was defined for the jury as a

> [C]ondition of mind . . . characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

This does not present a situation like that in Godfrey or Maynard. In Godfrey, the defendant was sentenced to death based only on the single aggravating circumstance that the offense of murder was outrageously or wantonly vile, horrible and inhuman. Godfrey v. Georgia, 446 U.S. at 426, 428. In the Godfrey case, there was no finding by the state supreme court that such an aggravated battery or torture had occurred and, in fact, the victims were killed instantaneously. Id. at 432-33.

In Maynard, this Court found that the language of the Oklahoma aggravating

circumstance gave no more guidance than the language of the Georgia aggravating circumstance in Godfrey. Similarly, the Oklahoma court failed to rectify the situation with a narrowing limitation. Maynard v. Cartwright, 108 S.Ct. at 1859. Thus, in both Godfrey and Maynard, this Court determined that the aggravating circumstances by themselves failed adequately to inform juries of what they must find to impose the death penalty in violation of the eighth amendment.

Unfortunately, the Ninth Circuit failed to analyze the important distinctions of Nevada law. Although the final sentence of the definitional instruction of depravity of mind used the same phrase found in Godfrey, the remainder of the definition was sufficiently definitive in and of itself. A jury was required to find that the defendant had an intent "which is devoid of regard for human dignity and which is indifferent to

human life" based upon the facts of the case. In this particular case, the facts were that the victim was found nude except for a blouse and bra which had been pulled apart and her "neck, face and head were severely bruised, bearing extensive abrasive-type injuries. Her head had a large depression skull fracture, two and three-fourth inches in diameter caused by a crushing or blunt type object." There were bite marks on the victim made by Deutscher's teeth. The victim had been strangled and all injuries were inflicted while the victi was still alive with the blow causing a hol to left side of her head being the last and lethal injury. The jury found that the offense had been committed in an attempt to commit a sexual assault. (Appendix E).

The same instructions given to Deutscher's jury in 1977 have been given to all other juries in Nevada considering this aggravating circumstance since that time.

The Nevada Supreme Court has upheld the aggravating circumstance of torture, depravity of mind or mutilation when supported by sufficient facts which usually demonstrate a lingering death and the defendant's "indifference to human life" and an intent "devoid of regard for human dignity."[7] Even the federal district court

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[7] See, e.g., Flanagan v. State, 105 Nev. 135, 771 P.2d 588 (1989) (repeated and varied attempts to kill over a period of time demonstrate depravity); Lopez v. State, 105 Nev. 68, 769 P.2d 1276 (repeated acts of child abuse prior to victim's demise); Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987) (pregnant female victim stabbed numerous times and tortured before death); Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986) (defendant cut out victim's vocal cords and shot him again after a shot to the face several hours before; defendant then amputated victim's hands and feet, attempted to cut off victim's head, used acid to remove victim's prints from fingers); Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986) (victims shot and stabbed numerous times before death); Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985) (inmate victim strangled by defendant prison inmate, had neck snapped back and died next day due to shortage of oxygen to brain); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984) (defendant doused teenage female sexual assault victim with

(continued...)

in this case upheld the depravity of mind aggravating circumstance, distinguishing Godfrey by the fact that Deutscher's jury was given further definition of the terms and based upon the facts of the case. (Appendix I).

The Nevada Supreme Court has revisited Godfrey often, and in fact has done so twice since Deutscher's case was decided by the Ninth Circuit in 1989. Nevada's high court has determined that the depravity of mind aggravating circumstance statute is not facially unconstitutional. As the Ninth Circuit did initially, the Nevada Supreme Court agreed that the torture and mutilation aspects of the aggravating circumstance are sufficiently clear and objective to satisfy the requirements of Godfrey. Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990).

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[7](...continued)
combustible fluid and lit her on fire while she was in a sitting or standing position).

Even more recently, in Jimenez v. State, 106 Nev. 769, 801 P.2d 1366 (1990), the Nevada Supreme Court held that notwithstanding apparently disjunctive language in the statute, the statute embraces only one aggravating circumstance. In order for the depravity finding to be upheld, the crime must include torture, mutilation or some other serious and depraved physical abuse beyond the act of killing itself.

Clearly, the facts concededly found to exist by the Ninth Circuit support a finding by a reasonable trier of fact of torture or mutilation. The federal courts must accord deference to these findings. Lewis, supra, at 3102. Upon review, this Court must conclude that the definitions given to Deutscher's jury, in concert with the narrowing construction recently enunciated, suffice to save the third aggravating circumstance found by the trial jury.

Even assuming there was error, it should not go without notice that the Ninth Circuit ordered a new hearing, thus obviating any opportunity for the Nevada Supreme Court (1) to either reweigh the aggravating and mitigating circumstances, or perhaps more importantly, (2) to determine whether or not the inclusion of one allegedly invalid aggravator was harmless error. Under Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441 (1990), this deference is required, even though a state's high court may conclude either that it does not have the authority to conduct such a rebalancing or alternatively, it does not have an inclination to do so. Clemons v. Mississippi, ___ So.2d. ___, 50 Crim. L. Rptr. 1451 (Miss. 1992).

The summary disposition of this issue by the Ninth Circuit was woefully inadequate. The result was clearly contrary to the decisions of this Court and the Nevada

Supreme Court. This Court should grant certiorari to review this conflict.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Henry Deutscher,	)	
	)	
Petitioner/Appellant/ Cross-Appellee,	)	Nos. 88-2552; 88-2579
	)	
v.	)	
	)	D.C. No.
Harol Whitley, Warden of the Nevada State Prison, and Brian McKay, Attorney General of the State of Nevada,	)	CV-N-86-445-ECR (NEVADA)
	)	ORDER AND DISSENT
Respondents/Appellees/ Cross-Appellants.	)	

Filed October 15, 1991

Before: Otto R. Skopil, Jr., Jerome Farris and Cynthia Holcomb Hall, Circuit Judges.

ORDER

In Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), we granted Deutscher's petition for writ of habeas corpus because he was represented by constitutionally deficient counsel at

sentencing and was prejudiced by his counsel's failure to present mitigating evidence and to challenge an unconstitutional aggravating factor. By order of the United States Supreme Court, we review this ruling in light of McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454 (1991), and Lewis v. Jeffers, 497 U.S. ___, 110 S.Ct. 3092 (1990).

The government sufficiently pleaded abuse of the writ. McCleskey, 499 U.S. at __, 111 S.Ct. at 1470. We determine whether Deutscher is excused from this default by the same standard used to determine whether to excuse state procedural defaults. Id. at 1468.

Deutscher is unable to establish cause for his failure to raise either the ineffective assistance of counsel or the invalid aggravating circumstance claim in his previous petition. Ineffective assistance of counsel establishes cause for

default only if the Sixth Amendment guarantees a right to counsel at the proceeding in which the default occurred. Coleman v. Thompson, 499 U.S. __, __, 111 S.Ct. 2546, 2566-68 (1991). Deutscher did not have a constitutional right to counsel in his first habeas appeal. His failure to raise valid constitutional claims in the original habeas appeal is attributable to the continued deficient representation of his counsel, but that does not establish cause for his default. Id.

Although Deutscher has not shown cause for his default, we retain authority to issue the writ if the petition "implicat[es] a fundamental miscarriage of justice." McCleskey, 499 U.S. at __, 111 S.Ct. at 1470. Where a constitutional violation has more probably than not resulted in a capital sentence for one who should not have been

sentenced to death, issuance of the writ is necessary to ensure that a fundamental miscarriage of justice does not occur. See Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989); Smith v. Murray, 477 U.S. 527, 537-39 (1986); Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1990).

The Supreme Court has not defined the standard by which the "fundamental miscarriage of justice" exception applies to the sentencing phase of a capital case. Adams, 489 U.S. at 412 n.6. The Eighth and Eleventh Circuits have addressed the issue and reached different conclusions. In the Eighth Circuit, the exception applies to the penalty phase of a capital case "'if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.'" Stokes, 893 F.2d 152, 156 (8th Cir. 1990) (quoting Smith v.

Armontrout, 888 F.2d 530, 545 (8th Cir. 1989)). The Eleventh Circuit has adopted a more restrictive approach:

> The sentenced defendant must demonstrate not merely that the error affected the sentencing outcome, but that the error resulted in a sentencing outcome of which the defendant is not eligible by virtue of his conduct.... That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty.

Johnson v. Singletary, 1991 WL 135998, *14 (11th Cir. July 25, 1991) (en banc).

Fundamental fairness, the hallmark of our Constitution, compels us to follow the standard recognized by the Eighth Circuit. The approach adopted by the Eleventh Circuit fails to fulfill the stated purpose of the fundamental miscarriage of justice exception. We recognize that the Constitution does not require that the trial in a capital case be perfect. But in a civilized society, we cannot ignore constitutional violations

that have so infected a capital case that an individual has been sentenced to die who, but for constitutional errors during sentencing, would likely not be put to death. The Eleventh Circuit requires not only that a defendant would not have been sentenced to death, it requires that the defendant could not have been sentenced to death. This approach offends the Constitution and fails to comport with Supreme Court precedent.

The death penalty escapes condemnation as cruel and unusual punishment only if its imposition is "at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The requirements of consistent application and fairness to the accused necessitate that a sentence of death be based on an informed and accurate decision. See Johnson v. Mississippi,

486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring in judgment))). Thus, in determining whether the fundamental miscarriage of justice exception applied in Smith v. Murray, the Supreme Court considered whether the defendant presented a "substantial claim that [constitutional] error undermined the accuracy of the . . . sentencing determination." 477 U.S. at 539. It is not enough that an error "is by its nature the kind of error that might have affected the accuracy of a death sentence." Adams, 489 U.S. at 412 n.6 (emphasis

added). Rather, the defendant must make a "colorable showing" that constitutional error, in fact, undermined the accuracy of the sentence. Smith, 477 U.S. at 538-39. Whether such a showing has been made "must be determined by reference to all probative evidence." Kuhlmann v. Wilson, 477 U.S. 436, 454-55 n.17 (1986) (emphasis in original).

Nevada law requires jurors to weigh mitigating and aggravating circumstances in determining whether a death sentence is warranted. The existence of a valid aggravating circumstance, standing alone, does not mandate death. It is the presence of a valid aggravating circumstance that invokes the "individualized capital sentencing doctrine" and requires that valid mitigating factors be considered. See Harmelin v. Michigan, 499 U.S. __, 111 S.Ct. 2680, 2701-02 (1991).

Constitutional errors can skew this required balancing to an extent that a "colorable showing" can be made that a defendant would not have received the death penalty, despite the underlying presence of a valid aggravating circumstance.

We do not ignore the discretion accorded the sentencing authority in weighing aggravating and mitigating circumstances. However, if, as a consequence of constitutional error, (1) the sentencing body never considered evidence critical to the exercise of its discretion and (2) it is more probable than not that the death penalty would not have been imposed had the evidence been considered, the writ must issue. To allow such a sentence to stand would violate the precepts of the Eighth and Fourteenth Amendments and belie principles of fundamental fairness.

Efforts to eliminate abuse of the writ are long overdue. But three factors must be foremost in our review. First, the "abuse of the writ" is a federal procedural doctrine based on principles of equity. McCleskey, 499 U.S. at __, 111 S.Ct. 1468-69. Second, this is a death sentence:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

Harmelin v. Michigan, 499 U.S. at __, 111 S.Ct at 2702 (1991) (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). Third, though resentencing implicates concerns of finality, judicial economy, and comity, a resentencing proceeding is a far less onerous task than a retrial.

Fundamental fairness requires that the equitable doctrine of abuse of the writ yield when constitutional errors at sentencing undermine the propriety of a death sentence.

To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination. See Smith v. Murray, 477 U.S. 527, 538-39 (1986). This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for constitutional error, the sentence of death would not have been imposed.

Because Deutscher's counsel was constitutionally deficient, no mitigating evidence was presented at sentencing. Had Deutscher been competently represented, the sentencing jury would

have considered mental health records of Deutscher showing diagnoses of schizophrenia, pathological intoxication, and organic brain damage; commitments to mental institutions; and a history of good behavior in institutional settings. The records would also have shown that Deutscher had asked for but had not received treatment for episodes of uncontrollable violence. Deutscher's family would have testified that Deutscher suffered fetal injury and was born prematurely due to a beating his mother received from his father, that Deutscher's father beat and occasionally seriously injured Deutscher, and that Deutscher was often beaten while trying to protect his mother and sisters. Dr. O'Gorman an experienced psychiatrist who examined Deutscher in 1977, would have testified that premature children such as Deutscher can develop a mental disorder

characterized by episodes of uncontrollable violence often accompanied by a temporary loss of memory and that Deutscher's story was consistent with the symptoms of this disorder.

The Supreme Court has repeatedly stated that the Constitution prohibits imposition of the death penalty without adequate consideration of factors that might evoke mercy. See, e.g., California v. Brown, 479 U.S. 538, 541 (1987); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987); Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). In this case, no mitigating evidence was provided to the jurors even though the available mitigating evidence suggests that Deutscher suffers from a congenital mental illness that responds well to institutional treatment. Responsibility for the failure to present this evidence to the jury is imputed to the State

through the ineffective assistance of Deutscher's Sixth Amendment counsel. Coleman, 499 U.S. at __, 111 S.Ct. at 2567.

Counsel's failure to present mitigating evidence was compounded by his failure to challenge the "depravity of mind" aggravating factor applied at Deutscher's sentencing. The definition of depravity of mind given at Deutscher's sentencing did not restrain arbitrary imposition of the death penalty. See Godfrey v. Georgia, 446 U.S. 420, 427 (1980). The depravity instruction, although it contained more words, suffered some of the defects of the "especially heinous, atrocious, or cruel" instruction rejected in Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988), and the "outrageously or wantonly vile, horrible or inhuman" instruction in Godfrey. It failed to include objective indicia

analogous to the instructions approved in Walton v. Arizona, 110 S.Ct. 3047 (1990), and Proffitt v. Florida, 428 U.S. 242 (1976). The depravity of mind instruction was unconstitutionally vague as applied to Deutscher. Nothing in Lewis v. Jeffers, 497 U.S. __, 110 S.Ct. 3092 (1990), leads to a contrary conclusion.

Judge Hall argues in dissent that the fact that "one of the three aggravating factors found by the jury was unconstitutionally vague does nothing to undermine the jury's finding that two other aggravating circumstances were applicable to Deutscher." Infra at __. It is the compounding of constitutional errors at Deutscher's sentencing, however, that infected the sentencing process to such a degree that the risk of Deutscher being wrongly put to death requires issuance of the writ in order to prevent a fundamental miscarriage of

justice. Nevada law requires the jury to balance mitigating and aggravating circumstances in determining whether a death sentence is warranted. The jury cannot fulfill this responsibility when a proper mitigating factor is not considered and an improper aggravating factor is considered. A new balancing between mitigating and aggravating factors is necessary. See Creech v. Arave, 928 F.2d 1481, 1492-93 (9th Cir. 1991).

In directing that abuse of the writ be governed by the procedural default standard, the Supreme Court did not intend to turn death penalty cases into a deadly game of procedures. The McCleskey standard recognizes the need to prevent wasteful, repetitive habeas petitions designed only to delay. However, a civilized society cannot take the life of a defendant who presents a valid claim

that his death sentence was entered in a proceeding that precluded a proper, informed exercise of discretion. Unlike the violation in McCleskey,[1] the failings that Deutscher asks us to consider go directly to the propriety of his death sentence. The Constitution will not permit Deutscher's life to be taken on the basis of a sentencing proceeding in which constitutionally inadequate counsel failed to present available mitigating evidence and did not challenge a constitutionally infirm aggravating factor. These errors so undermine the foundation for Deutscher's death sentence that the cornerstone principles of Eighth

Amendment jurisprudence require that the sentence be set aside.

We remand to the district court for entry of an order granting the writ of habeas corpus unless the state resentences Deutscher within a reasonable time.

REVERSED and REMANDED.

DISSENT

HALL, Circuit Judge, dissenting:

While I agree with the standard used by the majority to determine whether a petitioner is "actually innocent" of the death penalty, I cannot agree with the majority's application of that test to the facts of this case. I must, therefore, respectfully dissent.

I

Because this case demonstrates the different mode of analysis we are to

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[1] McCleskey concerned a Massiah v. United States, 377 U.S. 201, (1964), violation.

undertake once we determine that a subsequent federal habeas corpus petition is abusive, some background is in order. Deutscher was convicted of murder and sentenced to death by a Nevada state court in 1977. After direct and collateral appeals in state and federal courts, Deutscher filed his second federal habeas petition. This panel reviewed that petition in Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) (Deutscher I).

In Deutscher I, we erroneously held that Deutscher could raise claims for the first time in his second federal habeas petition because he had not "made a conscious decision to withhold claims, engage in piecemeal litigation, vex, harass, or delay." Id. at 1155-56. We found that two of Deutscher's claims had merit. First, we found that Deutscher was denied effective assistance of

counsel because Deutscher's lawyer failed to introduce any mitigating evidence at sentencing, despite its availability. Id. at 1159-61. We found this omission, along with counsel's inept closing argument, to be a result of incompetence rather than of trial tactics. Id. at 1160. Because we found a "reasonable probability" that the result would have been different but for counsel's errors at sentencing, we held that Deutscher should be resentenced. Id. at 1163.

Second, we found in Deutscher I that one of the statutory aggravating circumstances presented to Deutscher's sentencing jury was unconstitutionally vague. The judge instructed the jury at Deutscher's sentencing that any one of three aggravating circumstances would qualify Deutscher for the death penalty: (1) prior conviction of a felony involving the use or threatened use of

violence; (2) murder during an attempted sexual assault; or (3) murder involving "torture, depravity of mind, or the mutilation of the victim." Id. at 1154. The jury found all three of these aggravating factors. Id. We held that the "depravity of mind" instruction was unconstitutionally vague because it lacked objective factors which would restrain arbitrary imposition of the death penalty. Id. at 1162.[1]

The Supreme Court directed us to reconsider our decision in light of McCleskey v. Zant, 111 S.Ct. 1454 (1991). I now turn to that task.

II

The majority correctly holds that Deutscher's second federal habeas petition is an abuse of the writ under McCleskey because he cannot show cause for failing to raise the claims in his first federal habeas petition. The

majority errs, however, by holding that Deutscher can nonetheless press his claims on habeas because "a fundamental miscarriage of justice would result from a failure to entertain the claim." McCleskey, 111 S.Ct. at 1470. The "fundamental miscarriage of justice" exception to abuse of the writ is reserved for a petitioner who not only alleges a constitutional error but also makes a showing of factual innocence. Id. at 1471. The exception "serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.'" Id. (quoting Stone v. Powell, 428 U.S. 465, 492-93 (1976)).

In Smith v. Murray, 477 U.S. 527, 537 (1986), the Supreme Court held that the "fundamental miscarriage" exception applies to the sentencing determination in addition to the adjudication of guilt.

The Court has recognized that deciding whether a petitioner is "innocent" of a death sentence is problematic, and application of the rule in specific cases is difficult. See Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989); Smith, 477 U.S. at 537. The Court has, however, clearly stated that this exception is reserved for the "extraordinary" case. Adams, 489 U.S. at 412 n.6.

I agree with the majority that the test applied by the Eleventh Circuit in Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (en banc), is too stingy to guard against miscarriages of justice. Deutscher has not convinced me, however, that errors at his sentencing "'probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.'" Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1989)(quoting Smith v.

Armontrout, 888 F.2d 530, 545 (8th Cir. 1989)).

I believe that the majority focuses too heavily on whether Deutscher's sentencing was procedurally perfect rather than whether he has shown that a new jury probably would not sentence him to death. The Supreme Court has cautioned that "[d]emonstrating" that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." Adams, 489 U.S. at 412 n.6 (emphasis added). A "colorable showing," Smith, 477 U.S. at 538, that "a constitutional violation undermined the accuracy of the sentencing decision" is simply not enough. Adams, 489 U.S. at 412 n.6.[2] Instead, Deutscher must convince this

court that a jury on resentencing probably will not sentence him to death.

I cannot honestly believe that Deutscher will not again be sentenced to death by the next jury he faces. The

murder for which Deutscher was convicted was grisly and barbaric:

> On the morning of August 16, 1977, the body of Darlene Joyce Miller, 37, was discovered on the desert road . . . . She was nude except for a blouse and bra that had been pulled open around her shoulders. Her legs were spread apart and there was smeared blood between her upper thighs. She had superficial lacerations and abrasions on her breasts and abdomen which experts testified represented bite marks. Her neck, face and head were severely bruised, bearing extensive abrasive-type injuries. Her head had a large depression skull fracture two and three-fourths inches in diameter caused by a crushing or blunt type object. A trail of dripped blood led from the crime scene to [a nearby highway].
>
> ...
>
> A forensic pathologist testified as to the extent of injuries which the victim incurred, finding no evidence of recent sexual intercourse. The expert did testify that the victim had been strangled and that all the injuries were inflicted while the victim was still alive with the blow causing the two and three-fourths inch diameter hole to the left side of her head being the last and probable "lethal" injury.

Deutscher v. State, 601 P.2d 407 (Nev.

1979).

That one of the three aggravating factors found by the jury was unconstitutionally vague does nothing to undermine the jury's finding that two other aggravating circumstances were applicable to Deutscher. Moreover, I believe that the new jury will again find the "depravity" circumstance after it is appropriately limited by the trial judge's instructions to restrain arbitrary imposition of the death penalty.

Nor do I believe that a new jury probably will not again sentence Deutscher to death when it hears the mitigating evidence Deutscher now proposes to present. Our previous holding that the presentation of the mitigating evidence might have changed the result was based on our analysis of Deutscher's ineffective assistance of

counsel claim. Thus, our conclusion was based on our view that "[w]e cannot say with confidence that the jury's sentencing decision would have been the same in this case had Deutscher's counsel presented the available mitigating evidence." Deutscher I, 884 F.2d at 1160. Deutscher had only to convince us that there was a "reasonable probability" that the mitigating evidence would have an effect on the outcome of his sentencing. Id. But, in light of McCleskey, we have now learned that Deutscher is barred from pursuing his ineffective assistance claim in this, his second, federal habeas petition. The burden of persuasion is now on Deutscher and he has failed to carry it.

McCleskey and other abuse of the writ decisions teach us that once a petitioner is barred from habeas relief due to abuse of the writ, he may find relief in the

federal courts only if he demonstrates that he is actually innocent of either the crime or the death penalty. While Deutscher's claims would be cognizable were they not procedurally barred, they do not suffice to render him "actually innocent" of the death penalty. Because I believe that the jury on remand probably will, contrary to the majority's view, again condemn Deutscher to death, I respectfully dissent.

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[1] The Supreme Court directed that we reconsider this holding in light of Lewis v. Jeffers, 110 S.Ct. 3092 (1990). Lewis held that a statutory aggravating circumstance for murder committed in an "especially heinous, cruel or depraved manner" was not unconstitutionally vague as long as the trial judge gives sufficiently specific and objective instructions to the sentencing jury. Since the trial judge instructed Deutscher's sentencing jury in the bare language of the statute, Lewis is inapplicable. See Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990) ("[I]n both Maynard and Godfrey the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly

as vague. Neither jury was given a constitutional limiting definition of the challenged aggravating factor.") (citations omitted).

[2] Although the Court in McCleskey used the "colorable showing" language, it was merely quoting the plurality decision in Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). In Smith, decided on the very same day as Kuhlmann, a majority of the Court plainly rejected the argument that a "colorable showing" of error would excuse procedural defaults in state court. Smith, 477 U.S. at 538. Moreover, the Court in Adams made clear that a standard allowing evasion of the cause and prejudice standard for error that "might" have affected the accuracy of a death sentence is too lenient to excuse an abuse of the writ. Adams, 489 U.S. at 412 n.6.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

IN THE NINTH CIRCUIT

Henry Deutscher, Petitioner/Appellant/ Cross-Appellee, v. Harol Whitley, Warden of the Nevada State Prison, and Brian McKay, Attorney General of the State of Nevada, Respondents/Appellees/ Cross-Appellants.	Nos. 88-2552; 88-2579 D.C. No. CV-N-86-445-ECR (NEVADA) ORDER

Filed January 17, 1992

Before: SKOPIL, FARRIS and HALL, Circuit Judges.

Appellant's petition for rehearing is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Henry Deutscher,	)	
	)	
Petitioner/Appellant/	)	
Cross-Appellee,	)	Nos.88-2552,
	)	88-2579
v.	)	
	)	D.C. No.
Harol Whitley, Warden of	)	CV-N-86-445-
the Nevada State Prison,	)	ECR
and Brian McKay, Attorney	)	
General of the State of	)	OPINION
Nevada,	)	
	)	
Respondents/Appellees/	)	
Cross-Appellants.	)	
	)	

Appeal from the United States District Court for the District of Nevada
Edward C. Reed,
District Judge, Presiding

Argued and Submitted
January 10, 1989
San Francisco, California

Filed August 31, 1989

Before: SKOPIL, FARRIS and HALL, Circuit Judges.

OPINION

FARRIS, Circuit Judge:

Henry Deutscher appeals the district court's dismissal of his petition for writ of habeas corpus. Deutscher sought habeas corpus relief from a Nevada court's sentence of death. Nevada authorities appeal the district court's refusal to hold a hearing on whether Deutscher's petition was an abuse of the writ of habeas corpus. We reverse the district court's dismissal of Deutscher's petition and remand with instructions to grant the writ unless Deutscher is resentenced within a reasonable time.

FACTS

In 1977, a Nevada jury convicted Deutscher of first degree murder and of robbery without the use of a weapon. After a separate hearing, the same jury sentenced Deutscher to die. Witnesses at trial testified that the victim had been

strangled, beaten, and bitten, prior to suffering a fatal skull fracture.

Two potential jurors were excluded from Deutscher's jury because of their views on the death penalty. Both jurors said they would not impose the death penalty under any circumstances.

During the penalty phase of the trial, the court instructed the jury to impose the death penalty unless the mitigating circumstances outweighed the aggravating circumstances. The court instructed the jury as to three possible aggravating factors: (1) prior conviction of a felony involving the use or threat of violence; (2) murder during an attempted sexual assault; and (3) murder involving "torture, depravity of mind, or the mutilation of the victim." The jury found all three of these aggravating factors.

During both the guilt phase and the penalty phase, Deutscher was represented by Herbert Ahlswede. Ahlswede did not call any witnesses at the penalty phase hearing. Although Ahlswede made a tactical decision not to pursue an insanity defense during the guilt phase, he did not consider using psychological evidence during the penalty phase. Nor did Ahlswede investigate Deutscher's past psychiatric treatment or family background. Investigation would have revealed that Deutscher was born substantially premature, that he had been diagnosed as mentally ill and treated for mental illness, and that he had sought, but was not given, psychiatric care for uncontrollable violent outbursts. Dr. O'Gorman, a psychiatrist who examined Deutscher near the time of the murder, testified during a state post-conviction hearing that Deutscher's history was

consistent with a mental disorder characterized by episodes of uncontrollable violence.

Ahlswede did present a closing argument at the penalty phase hearing but referred to only one mitigating factor: that Deutscher killed while under the influence of an extreme mental disturbance. Ahlswede argued that such a brutal murder could only have been the product of a diseased mind.

The Nevada Supreme Court affirmed Deutscher's conviction and sentence. Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979). Ahlswede filed a habeas corpus petition on Deutscher's behalf in the United States District Court for the District of Nevada. The court directed Deutscher to submit four unexhausted issues to the state courts. Following exhaustion of those issues, the district court dismissed the petition.

Deutscher appealed to this court, and present counsel was substituted for Ahlswede. Present counsel determined that a number of federal issues were not presented by Ahlswede during post-conviction proceedings and asked us to remand the case to state court to allow the new issues to be raised. We denied remand and affirmed dismissal of the petition. Ahlswede v. Wolff, 720 F.2d 1108 (9th Cir. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 155 (1984).

Deutscher, through present counsel, then litigated his additional claims in state court. The state trial court denied relief, and the Nevada Supreme Court affirmed. Deutscher v. Warden, Nevada State Prison, 102 Nev. 388, 724 P.2d 213 (1986). The Nevada court held on the merits that Deutscher was not deprived of effective assistance of

counsel. Id. 724 P.2d at 214. The court held that Deutscher's other assignments of error were barred by procedural default. The court held that Deutscher could not show good cause for failing to raise his claims within one year of the resolution of his direct appeal and failing to raise his claims in his first petition for post-conviction relief. Id. (citing Nev. Rev. Stat. §§ 177.315(3) and 177.375(2)).

Deutscher again petitioned for habeas corpus. The petition set forth the following claims:

1. Deutscher was deprived of effective assistance of counsel.

2. Deutscher was sentenced to death without a finding of intent to commit murder.

3. The prosecutor's argument was improper.

4. Deutscher was sentenced to death based on the "torture, depravity of mind, or mutilation" aggravating circumstance.

5. The state used a concurrent felony both to support a felony murder conviction and as an aggravating circumstance.

6. The trial court failed to instruct the jury that the prosecution must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

7. Nevada improperly discriminates in imposing the death penalty.

8. Prospective jurors were improperly excluded.

9. The Nevada Supreme Court violated due process by failing to conduct a proper proportionality review.

10. Prejudicial evidence of prior bad acts was improperly admitted.

The United States District Court held that Deutscher was barred by unexcused procedural default from raising counts two, three, five, six, seven, nine, and ten. Deutscher v. Whitley, 663 F.Supp. 793, 800-01 (D.Nev.), reconsid. denied, 671 F.Supp. 1264, 1267 (D.Nev. 1987). The court rejected counts one, four, and eight on the merits. Deutscher v. Whitley, 682 F.Supp. 1098 (D.Nev. 1988).

I. STANDARD OF REVIEW

We review de novo a district court's grant or denial of habeas corpus relief. McKenzie v. Risley, 842 F.2d 1525, 1531 (9th Cir.) (en banc), cert. denied, _____ U.S. _____, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). We review for abuse of discretion the district court's decision not to dismiss the petition as an abuse of the writ. See Harris v. Pulley, 852

F.2d 1546, 1561 (9th Cir. 1988). A state trial court's determination of juror bias is presumed correct under 28 U.S.C. § 2254(d). Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). All other issues presented by this appeal are issues of law or mixed legal-factual issues. We review these issues de novo. See United States v. McConney, 728 F.2d 1195, 1200-1205 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

II. ABUSE OF THE WRIT

The state contends that the district court erred by failing to require Deutscher to prove in an evidentiary hearing that he had not abused the writ by bringing a successive habeas corpus petition. 28 U.S.C. § 2254, Rule 9(b) provides that:

> A second or successive petition may be dismissed if the judge finds that

> it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted abuse of the writ.

In Harris v. Pulley, we set forth a three-part test for determining whether a successive petition is an abuse of the writ under rule 9(b):

> Previously unadjudicated claims must be decided on the merits unless (1) the petitioner has made a conscious decision deliberately to withhold them, (2) is pursuing "needless piecemeal litigation," or (3) has raised the claims only to "vex, harass, or delay."

852 F.2d at 1572 (quoting Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985)). In Harris, previous counsel failed to make a claim, not for any tactical reason but "merely because he missed it." 852 F.2d at 1572. We held that because counsel had not made a conscious decision to withhold claims, engage in piecemeal litigation, vex, harass, or delay, the successive petition was not an abuse of the writ. Deutscher's previous counsel similarly made no conscious decision to withhold claims. The claims simply did not occur to counsel. The district court correctly held that Deutscher's petition was not an abuse of the writ.

III. PROCEDURAL DEFAULT

The district court held that counts two, three, five, six, seven, nine, and ten were barred by procedural default. Deutscher claims this holding was error.

The state argues that all of Deutscher's claims should have been rejected because of Deutscher's procedural default in failing to raise the claims in the first state post-conviction proceeding, see Nev. Rev. Stat. 177.315(3), and in failing to file his petition for state post-conviction relief within one year of final resolution of his direct appeal. See Nev. Rev. Stat. 177.375(2).

A state prisoner barred by procedural default from litigating a claim in state court may not litigate that claim in a habeas corpus proceeding unless he can show cause for and actual prejudice from the default. Engle v. Isaac, 456 U.S. 107, 110, 102 S.Ct. 1558, 1563, 771 L.Ed.2d 783 (1982) (citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)).

Whether there is cause for procedural default will "ordinarily turn

on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Deutscher attempts to demonstrate cause for his procedural default by showing either that his counsel's failure to raise each claim deprived him of effective assistance of counsel or that the claims were unavailable at the time they should have been raised. Either showing is sufficient to establish cause. Id.

Ineffective assistance of counsel is sufficient cause to excuse procedural default. "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." Id.

An ineffective assistance of counsel claim has two components.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Because actual prejudice is an aspect of ineffective assistance of counsel, a defendant who proves ineffective assistance need not make any additional showing of prejudice to overcome procedural default.

Cause also exists when the claim is novel in that it had "no reasonable basis in existing law" at the time of the procedural default. Reed v. Ross, 468 U.S. 1, 15, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984). But "the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). To overcome procedural default, a defendant who demonstrates that his claim was unavailable at the time it should have been raised must also show that he was prejudiced by his counsel's failure to raise the claim. See Engle v. Isaac, 456 U.S. at 110, 102 S.Ct. at 1563.

A. Count One: Ineffective Assistance

This claim is not subject to procedural default because the Nevada Supreme Court reached the merits. See Wainwright v. Sykes, 433 U.S. at 87, 97 S.Ct. at 2506; Deutscher v. Warden, Nevada State Prison, 724 P.2d at 214 (reaching the merits of Deutscher's ineffective assistance claim).

B. Count Two: No Finding of Intent

The court instructed the jury that, under Nevada's felony murder statute, it could convict without finding that Deutscher intended to kill the victim. Deutscher contends that unintentional murder is an insufficient offense to justify imposition of the death penalty.

Deutscher's reasons for failing to raise this claim are not sufficient cause for procedural default. Deutscher's

counsel was unaware of this claim. The mere fact that counsel failed to recognize the factual or legal basis of a claim, however, is not cause for default. Murry v. Carrier, 477 U.S. at 486-87, 106 S.Ct. at 2644-45. Although Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), held, prior to resolution of Deutscher's appeal, that the death penalty is a disproportional penalty for rape, it was not until Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), that the Supreme Court questioned imposition of the death penalty in felony murder cases. Given the state of the law at the time, counsel's failure to raise the claim was not outside the "wide range of reasonable professional assistance." See Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel's failure also may not have been prejudicial. See Tison v.

Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (holding that the death penalty could be constitutionally imposed against a defendant who neither intended to kill nor actually killed but who was recklessly indifferent to human life).

Novelty of this claim is also insufficient cause for procedural default. The claim that a sentence was disproportional to the crime was available when Deutscher appealed. See Weems v. United States, 217 U.S. 349, 371, 30 S.Ct. 544, 550, 54 L.Ed. 793 (1910); Coker, 433 U.S. at 596, 97 S.Ct. at 2868.

C. Count Three: Improper Argument

Deutscher claims that the prosecution misstated the law and prevented the jury from considering mitigating evidence by saying "what you

voluntarily take into your system isn't any defense."

Although Deutscher's counsel was unaware of the claim, this unawareness was not egregious enough to be ineffective assistance. Nor did prejudice result from failure to raise the claim. A prosecutor's argument does not violate the Constitution unless it renders the defendant's trial "so fundamentally unfair as to deny him due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). A misstatement of the law can deny due process, but reversal is not warranted unless the misstatement prejudiced the hearing. United States v. Becker, 720 F.2d 1033, 1036 (9th Cir. 1983). See also Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987), cert. denied, ___ U.S. ____, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988).

Deutscher's contention that this claim of improper argument was unavailable in 1977 also lacks merit. See, e.g., DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431; U.S. v. Martinez, 514 F.2d 334, 343 (9th Cir. 1975).

D. Count Four: Torture, Depravity of Mind, or Mutilation

Procedural default does not apply to this claim because the claim was properly raised in state court.

E. Count Five: Double Counting of Concurrent Felony

Deutscher contends that the trial court erred in allowing the jury to use a concurrent felony both to convict him of felony murder and as an aggravating circumstance for imposition of the death penalty.

Failure to raise this issue was not prejudicial. See Lowenfield v. Phelps,

484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (holding that use of the same circumstance as both a guilt phase element and an aggravating circumstance is constitutional as long as the class of death eligible persons is genuinely narrowed).

F. Count Six: Sentencing Standard

Deutscher contends that the court erroneously instructed the jury to impose the death sentence unless mitigating factors outweighed aggravating circumstances.

> As with other claims, Deutscher admits this was a developing issue at the time of his direct appeal. Because of this, Deutscher's counsel was not ineffective for failing to raise the claim. That the issue was "developing" also indicates that the claim was available.

G. Count Seven: Discrimination

Deutscher contends that the death penalty was improperly imposed against him because the penalty is discriminatorily imposed against poor persons, males, and those convicted of killing white women. Deutscher was not prejudiced by his counsel's failure to raise this claim. See McClesky v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1766, 95 L.Ed.2d 262 (1987) (holding that statistical bias in imposition of the death penalty does not mandate reversal of individual death sentences).

H. Count Eight: Exclusion of Prospective Jurors

Deutscher contends that jurors were improperly excluded from his jury despite their willingness to impose the death penalty in the proper circumstances. Deutscher was not prejudiced by his counsel's failure to raise this claim.

If the claim had been brought, a reviewing court would have affirmed.

A juror may be excluded when the juror's scruples against the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985)). Juror bias is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Wainwright v. Witt, 469 U.S. at 428-29, 105 S.Ct. at 854-55. Thus, the question before a reviewing court is not whether the court agrees with the trial court's findings, but whether those findings are fairly supported by the record. Id. at 434, 105 S.Ct. at 857 (citing Marshall v.

Lonberger, 459 U.S. 422, 432, 103 S.Ct. 843, 849, 74 L.Ed.2d 646 (1983)).

The trial court's finding that jurors Gossard and Norris were properly excluded is supported by the record. Both jurors said during voir dire that they could not impose the death penalty under any circumstances.

Q. (Mr. Ahlswede)

So you are saying that you could never under any circumstances at any time impose a death penalty on an individual, no matter how awful the crime was?

A. (Juror Gossard)

I never been able to since a few things happened in my life. I just--I just couldn't do it.

* * * * * *

Q. (Mr. Ahlswede)

Do you feel that you could never under any circumstances send anyone to the gas chamber?

A. (Juror Norris)

No, I could never.

The district court incorrectly found that Deutscher's counsel rendered ineffective assistance by failing to assert improper exclusion of jurors on appeal. Because Deutscher was not prejudiced by his counsel's failure to raise this claim, Deutscher's claim on this issue is barred by procedural default.

I. Count Nine: Improper Proportionality Review

Deutscher contends the Nevada Supreme Court failed to properly conduct the proportionality review required by Nevada's death penalty statute and thus deprived Deutscher of a liberty interest without due process. Deutscher was not

prejudiced by his procedural default. See Pulley v. Harris, 465 U.S. 37, 50-51, 104 S.Ct. 871, 879-80, 79 L.Ed.2d 29 (1984) (holding that the Constitution does not require proportionality review).

J. Count Ten: Prejudicial Evidence Introduced at Sentencing

Deutscher argues that the trial court violated due process during the penalty phase hearing by allowing the state to prove a prior sexual assault conviction by testimony of the victim and arresting officer. This claim was available to counsel. No case decided since Deutscher's appeal has significantly changed the type of evidence that can be presented during the penalty phase. Proving that introduction of evidence violated due process is extraordinarily difficult. See Hobbs v. Lockhart, 791 F.2d 125, 128 (8th Cir. 1986) (holding that to violate due

process, evidence must be so conspicuously prejudicial or of such magnitude that it fatally infected the trial and deprived the defendant of fundamental fairness). Given the small likelihood of success, counsel's decision not to raise the claim was within the broad parameters of reasonably effective assistance.

IV. INEFFECTIVE ASSISTANCE

Deutscher argues that he was deprived of the effective assistance of counsel in violation of the Sixth Amendment. Deutscher's ineffective assistance claims fall into two categories: first, Deutscher claims that counsel failed to investigate and present mitigating evidence at the penalty phase hearing; second, Deutscher claims that counsel failed to present meritorious claims on appeal. Because Deutscher also claims that ineffective assistance on

appeal was cause for his procedural defaults, Deutscher's claims of ineffective assistance on appeal are addressed in the preceding section.

Deutscher claims that his counsel's failure to investigate and present mitigating evidence at the penalty phase was ineffective assistance. We evaluate Deutscher's claim under the two-part Strickland test. First, Deutscher must show that his counsel's performance was deficient. Second, Deutscher must show that his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 104 S.Ct. at 264.

In evaluating Deutscher's counsel's performance, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the

challenged action 'might be considered sound trial strategy.'" Id. at 689, 104 S.Ct. at 2065 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)). We do not look at counsel's performance through the distorting lenses of hindsight, but rather examine counsel's performance according to what was reasonable at the time. Id.

We agree with the district court that Deutscher's counsel's performance was defective. Counsel's sole mitigation argument was that Deutscher must have had some sort of mental problem. Yet counsel did not even consider presenting evidence of Deutscher's mental problems or any other mitigating evidence at the penalty phase hearing. Counsel himself admitted at the state trial court hearing on this issue that this aspect of Deutscher's representation was deficient. Counsel

made no tactical decision not to investigate Deutscher's possible mental impairment. He simply failed to do so.

We do not hold that failure to present mitigating evidence at a capital sentencing hearing is always defective performance. In certain cases, counsel might reasonably decide that mitigation evidence would present more problems than it would solve. In Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), the Court rejected a claim of ineffective assistance where counsel failed to present evidence in mitigation at a capital sentencing hearing. The Court noted:

> [T]here are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a nonviolent man would have opened the

> door for the State to rebut with evidence of petitioner's prior convictions. . . . For that reason, after consultation with petitioner, defense counsel rejected use of psychiatric testimony.

Id. at 186, 106 S.Ct. at 2474. Counsel in this case did not make a reasoned decision not to use psychiatric testimony. Nor did he decide to rely on a simple plea for mercy. Rather, counsel decided to defend on the basis of petitioner's psychiatric problems, but did not even consider investigating evidence which would have bolstered that defense. Counsel could not have chosen to avoid psychiatric evidence because of potentially damaging rebuttal testimony. Counsel did not even know what evidence was available.

Ahlswede had a "duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. He did neither. In Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988), we considered a similar case. Counsel knew his client had some history of mental problems, but "conducted no investigation to ascertain the extent of any possible mental impairment," id. at 636, and did not present any mitigating evidence at his client's death penalty hearing. "Under these circumstances, counsel's failure to pursue the possibility of establishing . . . mental instability constituted deficient performance." Id. at 637. This case is virtually identical. Counsel knew from the report of Dr. O'Gorman that Deutscher had been hospitalized for mental problems in the past, but counsel completely failed to pursue the possibility of presenting

mitigating evidence of mental impairment. Deutscher's counsel's performance was deficient.

The district court rejected Deutscher's ineffective assistance claim, however, holding that Deutscher had not shown prejudice as required by the second part of the Strickland test. To show that prejudice resulted from his counsel's defective performance, Deutscher must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. We cannot say with confidence that the jury's sentencing decision would have been the same in this case had

Deutscher's counsel presented the available mitigating evidence.

The penalty phase hearing Deutscher received consisted of extensive testimony about an incident in 1967 in which Deutscher sexually assaulted a young woman. This testimony included the woman's own emotional and graphic description of the attack. This was followed by an extremely persuasive closing argument in which the prosecutor detailed five aggravating circumstances and then demonstrated the complete absence of any of seven mitigating circumstances. Next, Deutscher's counsel admitted there was "no excuse" for what Deutscher had done, admitted the presence of the aggravating circumstances detailed by the prosecutor, and argued in mitigation only that "such a sick mind is not to be punished but rather to be pitied." Finally, the prosecutor

accurately pointed out the complete lack of any evidence of mitigation--"as far as insanity, the first thing you hear about it is an argument here on penalty. Don't you believe if he had a doctor that would say he was insane, which he is entitled to, that you would have had him on the stand here?"

Having that doctor on the stand might have made a difference. Dr. O'Gorman, a competent, experienced psychiatrist who examined Deutscher in 1977, would have testified that premature children such as Deutscher can develop a mental disorder characterized by episodes of uncontrollable violence that are often accompanied by a temporary loss of memory. He would have testified that stress and alcohol can make such an outburst more likely and that Deutscher's story that he had blacked out was consistent with the symptoms of this

disorder. Mental health records would have shown diagnoses of schizophrenia, pathological intoxication, and organic brain damage; commitments to mental institutions; and a history of good behavior in institutional settings. The records would have also shown that Deutscher had asked for but had not received treatment for episodes of uncontrollable violence. Deutscher's family would have testified that Deutscher suffered fetal injury and was born prematurely due to a beating his mother received from his father, that Deutscher's father beat and occasionally seriously injured Deutscher, and that Deutscher was often beaten while attempting to protect his mother and sisters from his father.

In finding that counsel's deficiencies were not prejudicial, the district court pointed to testimony by

Dr. Master disputing Dr. O'Gorman's conclusions and the previous diagnoses. Dr. Master testified that Deutscher was not mentally ill, but rather had no social conscience. The court speculated that the jury might have considered this lack of social conscience testimony as further aggravation. Dr. Master's testimony might have been successfully rebutted. Dr. Master did not take into account Deutscher's premature birth, fetal injury, or childhood beatings. Dr. Master admitted that Deutscher would do well in an institutional setting. In addition, Dr. Master might have been impeached by evidence that Dr. Master has been an overzealous prosecution witness in other murder trials. Moreover, much of Dr. Master's testimony would have been inadmissible at the penalty phase hearing. Dr. Master was appointed by the trial court to determine Deutscher's

competence to stand trial. When "a psychiatrist designated by the trial court to conduct a neutral competency examination" goes beyond simply reporting on competence and testifies at the penalty phase, he becomes like "an agent of the State recounting unwarned statements made in a post-arrest custodial setting," and use of his testimony could violate the Fifth Amendment. Estelle v. Smith, 451 U.S. 454, 467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981).

Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy. California v. Brown, 479

U.S. 538, 554, 107 S.Ct. 837, 846, 93 L.Ed.2d 934 (1987). "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death'" Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality)). The Supreme Court has consistently held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982)). See also, Hitchcock v. Dugger, 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824-25, 95 L.Ed.2d 347 (1987). Deutscher's state appointed lawyer failed to present any mitigation evidence at all. A finding that Deutscher was not prejudiced by this

failure would deny Deutscher the chance to ever have a jury, Nevada's death penalty arbiter, fully consider mitigating evidence in his favor. Instead, second hand bits and pieces of mitigation evidence would be analyzed and rebutted based only on speculation about what might have happened if dozens of important variables had been different. Allowing the death penalty to be imposed in that context would fall far short of the constitutional mark. We therefore reverse and remand for resentencing so that a jury can properly weigh mitigating and aggravating circumstances before deciding Deutscher's fate.

In our efforts to protect the constitutional right to "effective assistance of counsel" recognized in McMann v. Richardson, 397 U.S 759, 771 n.14, 90 S.Ct. 1441, 1449, n.14, 25 L.Ed.2d 763 (1970), we have often treated

"ineffective assistance of counsel" as if it were a defense available to one accused of a crime. It is not a defense. Rather, it is an indictment of counsel that results in relief to one who is unfortunate enough to have been represented incompetently. Because of our treatment of the issue, defense lawyers may be encouraged to leave behind a trail of mistakes in a hopeless case so that there is some possibility of relief on ineffective assistance grounds in a case in which no relief is legally available to the accused. We cannot and do not accuse counsel of such reprehensible conduct. We must therefore conclude that the incompetent act is performed because the lawyer is not competent to represent those accused of crime. Courts should not tolerate incompetence so flagrant as to be ineffective assistance. Nor should

courts tolerate deliberate mistakes which amount to both a dereliction of duty and an egregious lack of candor toward the courts. In the case of deliberate mistakes, it may become necessary for this court to act to prevent and deter such conduct. It is within our supervisory powers, for example, to revoke the privilege of practice before this court when an attorney is found "guilty of conduct unbecoming a member of the bar of the court . . . ." Fed. R. App. P. 46(b). In appropriate cases, we will not hesitate to do so.

V. NEVADA'S TORTURE, DEPRAVITY, MUTILATION AGGRAVATING CIRCUMSTANCE

Deutscher argues that the aggravating circumstance of torture, depravity of mind, or mutilation of the victim was unconstitutionally vague as applied to him. Nevada must not allow arbitrary and capricious imposition of

the death penalty. See Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). The Supreme Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988). Because the jury was instructed that it could find this aggravating circumstance if torture, depravity of mind, or mutilation occurred, each of the three elements must be evaluated.[1] The torture and mutilation aspects of this circumstance are sufficiently clear and objective to satisfy the requirements of Godfrey. The cutting off or destruction of a portion of the body (mutilation) is

an objective difference between a murder by mutilation and any other murder. See Godfrey, 446 U.S. at 428, 100 S.Ct. at 1764. Intent to cause cruel pain and suffering for sadistic purposes is a similarly objective and reviewable distinction.

The depravity of mind instruction, however, fails to meet Godfrey requirements. There is nothing in the definition of depravity of mind that restrains arbitrary imposition of the death penalty. See Godfrey, 446 U.S. at 428, 100 S.Ct. at 1764. The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the "especially heinous, atrocious, or cruel" instruction rejected in Maynard or the "outrageously or wantonly vile, horrible or inhuman" instruction in Godfrey. See also Adamson v. Ricketts, 865 F.2d 1011,

1029 (9th Cir. 1988) (en banc) (holding Arizona "especially cruel, heinous, and depraved" aggravating circumstance unconstitutional as applied).

Because the jury found two aggravating circumstances besides the torture, depravity of mind, or mutilation circumstance, however, Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987) (citing Zant v. Stevens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)), would require affirmance as to this issue had we not decided to reverse on the basis of Deutscher's ineffective assistance claim.

CONCLUSION

The case is remanded to the district court for entry of an order granting the writ of habeas corpus, unless the state resentences Deutscher within a reasonable time. All of Deutscher's claims except counts one and four are barred by

procedural default. The district court erred only in its determination that Deutscher was not prejudiced by his counsel's deficient performance in failing to investigate or present any mitigating evidence. Because Deutscher was denied his right to effective assistance of counsel at sentencing, his 1977 sentence must not be carried out.

REVERSED and REMANDED.

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[1] The relevant instructions were:

Instruction No. 21: the essential elements of murder by means of torture are: (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion, or for any other sadistic purpose.

The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased, nor does it necessarily require any proof that the deceased suffered pain.

Instruction No. 22: the condition of mind described as depravity of mind is

characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Instruction No. 23: You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Henry DEUTSCHER, Petitioner, v. Harol WHITLEY, Warden of the Nevada State Prison; and Brian McKay, Attorney General of the State of Nevada, Respondents.	Case No. CV-N-86-445-ECR

March 23, 1988

ORDER

EDWARD C. REED, Jr., Chief Judge.

The Court, by its order of December 17, 1987, ordered that an evidentiary hearing be held with respect to the ineffective assistance of counsel claims in count one of this petition. The hearing was held on January 6, 1988, at which time the Court received evidence and argument relating to Public Defender Ahlswede's representation of the

petitioner at the murder trial in 1977. In order to set these issues in their proper temporal framework, it is necessary to review the complete history of this case.

The petitioner was convicted of murder and sentenced to death in Clark County, Nevada, in November 1977. His attorney at that time was Public Defender Ahlswede. Ahlswede appealed the petitioner's conviction directly to the Nevada Supreme Court, but that court affirmed the conviction in October, 1979. Ahlswede then petitioned the United States District Court on behalf of his client for a federal writ of habeas corpus in January, 1980, but that petition was dismissed, apparently for failure to exhaust all state remedies.

The petitioner then returned to the state system to exhaust. A post-conviction petition was filed in June,

1980, and dismissed shortly thereafter. The state supreme court affirmed this dismissal in July, 1981. The petitioner then sought a federal writ of habeas corpus in August, 1982. Judge Foley reached the merits of that petition, and found that there was no basis for relief contained therein. Petitioner appealed this decision to the Ninth Circuit. At this time, Mr. Ahlswede ceased to represent the petitioner, and current counsel substituted in. Counsel immediately attempted to amend the petition before the Ninth Circuit to include all the claims in the present petition. This request was denied, ostensibly because these added claims were unexhausted in the state system. The Ninth Circuit affirmed Judge Foley's order of dismissal.

The petitioner and his counsel then returned to the state system again. In

May, 1983, they filed a new post-conviction petition, which contained, among other things, claims that Ahlswede's representation of the petitioner at the trial level had fallen below the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This petition was amended in May, 1985, and ultimately denied in November of that year. The state supreme court upheld that order in September, 1986.

The petitioner then set his sights on the federal system once again, and filed a second petition for the writ of habeas corpus in September, 1986. The state argued strenuously that the claims presented in that second petition were barred by the doctrine of procedural default, as they had not been presented properly to the state courts. The state courts had indeed refused to consider the

merits of the claims for that failure. Because the procedural default argument seemed to have merit, the Court held an evidentiary hearing on the issue of procedural default and the existence of cause and prejudice on May 11, 1987. The main thrust of the petitioner's argument was that his counsel, Mr. Ahlswede, was ineffective in his failure to raise the claims, and that cause and prejudice had therefore been established. (It is important to note that ineffective assistance of counsel was debated at the first evidentiary hearing purely as a means of establishing cause and prejudice, and not as a substantive habeas corpus count.)

As a result of that evidentiary hearing, the Court issued an order on June 25, 1987, in which it found that the petitioner had not established cause and prejudice, as he had not shown that his

attorney had been defective in failing to raise the issues presented in counts 2, 3, 5, 6, 7, 9, and 10 of the current petition. These claims were found subject to the procedural default rule, and were dismissed from the petition. The Court did find that former counsel had rendered insufficient assistance for Strickland purposes on count 8. This claim was allowed to remain in the petition. Counts 1 and 4 were never the potential subject of the procedural default, as they had been raised properly in the state courts. Of the original counts in the petition, therefore, only counts 1, 4, and 8 remain.

COUNT ONE/INEFFECTIVE ASSISTANCE OF COUNSEL

This count contains eleven separate claims for relief, all of which must be addressed separately. The petitioner contends that his attorney's assistance

fell below the reasonableness standard in Strickland, as he (1) failed to challenge the constitutionality of the torture/ depravity of mind instruction (count 1(d) of the petition); (2) failed to challenge the penalty phase burden of proof instruction (count 1(e)); (3) failed to challenge the lack of scienter in finding the petitioner eligible for the death penalty (count 1(f)); (4) failed to object to the introduction of hearsay and character evidence at the penalty phase (count 1(g)); (5) failed to object to prosecutor's misstatements with respect to mitigating circumstances (count 1(h)); (6) failed to object to the "doubling up" of aggravating circumstances (count 1(i)); (7) failed to present a penalty phase defense (count 1(j)); (8) failed to introduce evidence of insanity at the guilt phase, where psychiatric testimony would have indicated the petitioner's

mental illness (count 1(k)); (9) failed to call the petitioner at the guilt phase (count 1(l)); (10) failed to investigate the petitioner's past psychiatric history (count 1(m)); and (11) conceded the petitioner's guilt at the penalty phase and argued that the aggravating circumstances presented were not subject to dispute (count 1(n)).

COUNTS 1(e), 1(f), 1(g), 1(h), and 1(i)

The Court notes, however, that it has already decided that Mr. Ahlswede's representation did not fall below the Strickland standard with respect to counts 1(e), 1(f), 1(g), 1(h), and 1(i) listed above. These five counts were also named as independent substantive bases for relief in the petition. Thus, for example, while count 1(d) alleges that counsel was ineffective for failing to challenge the burden of proof at the penalty phase, count six alleges that the

burden of proof instruction used by the count [sic] was unconstitutional. Yet count six was subject to procedural default, and the petitioner attempted to defend against this rule by showing that counsel was ineffective for failing to raise that claim. The Court decided, as described above, that there was no ineffective assistance of counsel in failing to raise count six. Inasmuch as the standard for establishing attorney ineffectiveness for cause and prejudice is also the Strickland test, the Court has already decided the ineffectiveness issue in count 1(e). See Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397 (1986). Ineffective assistance of counsel count 1(f) similarly corresponds with count 2, count 1(g) with count 10, count 1(h) with count 3, and count 1(i) with count 5. As these issues have been decided by the Court's

previous order, that order is law of the case with respect to them, and the issues may not be relitigated here.

COUNT 1(d)

This ineffective assistance of counsel count is similarly related to count 4 of the petition, Count four, however, was not the subject of a procedural default count, and the Court has therefore not made any rulings with respect to counsel's performance. Because this count is so strongly tied with count 4, it does seem logical to delay decision until consideration of count 4, as the prejudice plank of the Strickland test requires the same inquiry as will count 4.

COUNT 1(j)

In this count, the petitioner argues that Ahlswede's representation fell below the Strickland standards when he failed to put on any penalty phase defense.

Review of the record indicates that Ahlswede did not call any witness or introduce any independent evidence at the penalty phase. He did, however, cross-examine all prosecution witnesses, and did make a closing argument to the jury. Thus, to state that he failed to put on any penalty phase defense whatsoever is not entirely correct. The question, more aptly put, is whether he failed in his duties under Strickland by not introducing any evidence of his own.

This issue is easily laid to rest. As the Eighth Circuit has recently noted

> [T]he fact that mitigating evidence is not set forth does not inexorably lead to a conclusion of ineffective counsel. One must look further as to why the mitigating evidence was not produced. If counsel has through neglect failed to discover such evidence, then counsel will be

> found ineffective. If, however, the mitigating evidence is not produced because counsel, after reasonable investigation and exercise of professional judgment, has determined that withholding of such evidence is the more strategically sound course, then there has been no ineffectiveness.

Laws v. Armontrout, 834 F.2d 1401, 1410 (8th Cir.1987); see also Campbell v. Kincheloe, 829 F.2d 1453, 1462 (9th Cir. 1987). That the petitioner's attorney did not introduce any evidence at the penalty phase in this case is not of itself a basis for habeas relief. The relevant inquiry focuses upon the reasons that attorney had in not producing any such evidence. Counts 1(k) and 1(m) allege that Ahlswede ignored evidence vital to the effective penalty phase defense of his client without substantial

reason for doing so. Count 1(j) will therefore be considered in conjunction with those two counts.

COUNTS 1(k) and 1(m)

In these two counts, the petitioner contends that Ahlswede's representation was constitutionally flawed in that he failed to introduce evidence of insanity at the guilt phase, where psychiatric evidence existed that tended to prove that the petitioner suffered from a mental illness. Similarly, the petitioner argues that Ahlswede failed to investigate the petitioner's psychiatric background, including his family, former teachers, his 1967 sexual assault conviction, and his previous psychiatric records. By failing to investigate the petitioner's past, and by failing to introduce evidence of mental illness, the petitioner contends that his former

attorney deprived him of his key defense at the penalty phase--insanity.

It appears to the Court that counts 1(k) and 1(m) really state both planks of the Strickland test. In count 1(m), petitioner argues that his attorney exercised unreasonable professional judgment in failing to investigate his psychiatric background sufficiently. In count 1(k), petitioner then argues that he was prejudiced by counsel's failure to introduce that evidence at the penalty phase. The Court will consider the counts in that fashion.

[1] Whether counsel's failure to investigate adequately the petitioner's background in search of mitigating evidence amounts to ineffective assistance of counsel depends on whether counsel made a decision, supported by reasonable professional judgment, not to pursue this evidence. See, Burger v.

Kemp, ____ U.S. ____, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987); Strickland v. Washington, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984); Armstrong v. Dugger, 833 F.2d 1430, 1432 (11th Cir.1987); Profitt v. Waldron, 831 F.2d 1245, 1428-49 (5th Cir.1987); Campbell v. Kincheloe, supra, pg. 1101.

[2] In this case, it appears that Mr. Ahlswede's decision not to pursue the petitioner's psychological history was unreasonable, in light of all of the circumstances. At the state evidentiary hearing on this issue, which has been made part of this record by the parties, Mr. Ahlswede testified that he had determined before the guilt phase that the insanity defense would not be viable in this case. Counsel rested his conclusion upon the results of an electroencephalogram performed upon the petitioner, and the resulting

interpretation of that test which yielded no evidence of organic brain deficiency. See Exhibit L (Reporter's Transcript of Post-Conviction Hearing, July 12, 1985) at pg. 88. Counsel thus made a reasoned decision not to pursue insanity as a substantive defense to the crime of murder.

Petitioner's evidence at this Court's hearing on ineffective assistance of counsel has made clear, however, that evidence which may properly be rejected at the guilt phase of a death penalty case must be reexamined in light of the issues presented at the penalty phase. Especially where psychological evidence is concerned, the fact that the insanity defense may not ever be successful as a substantive defense should not automatically preclude consideration of that evidence from the penalty phase. That evidence may well save the defendant

from the death penalty, even if it cannot save him from conviction.

In this case, the record shows that Mr. Ahlswede did not consider any psychological evidence in his penalty phase preparation. Counsel admitted this failure at the state evidentiary hearing:

> Q. You'd agree that you did not satisfy the obligation to investigate fully the potential mitigating factors. Isn't that correct?
>
> A. As regarding his background.
>
> Q. And including potential mental health problems? Yes?
>
> A. Yes.
>
> Q. And including the possibility of intoxication and the amount of intoxication on the night of the defense?
>
> A. Yes.

Exhibit L, pg. 80. Counsel did make a tactical decision not to pursue the insanity defense at the guilt phase of the trial, which is the kind of decision virtually untouchable under Strickland. The record is clear that he made no such reasoned decision with respect to the penalty phase. Indeed, he made no decision at all. If Mr. Ahlswede had delved further into his client's background, he would have discovered evidence that the petitioner was a premature baby, that he had severe medical problems in the first months of life and was not expected to live. The testimony of Dr. O'Gorman at the state post-conviction hearing indicated that premature infants often display various symptoms of organic brain deficiencies, and suffer from other mental problems later in life. Further investigation into the petitioner's background would

also have uncovered involuntary commitments to New York psychiatric hospitals, and the records attendant thereto. Investigation of these records would have revealed the fact that the petitioner had been diagnosed as a paranoid schizophrenic on one occasion, and that he had registered positive for organic brain damage on an earlier EEG. There was therefore a fair amount of important evidence to be uncovered by further investigation into the petitioner's background.

The failure to investigate petitioner's background is especially perplexing in light of the fact that Mr. Ahlswede's only argument to the jury centered around the petitioner's mental state. In essence, counsel posited to the jury the proposition that a sane man could not have committed such a violent and brutal murder. Therefore, he

contended, his client was not a candidate for the death penalty because of his mental infirmity. This appeal to the jury regarding the petitioner's mental state was the only substantive argument which counsel put forth in the penalty phase. Counsel did contend that no expert evidence was required to establish the petitioner's mental illness, but it seems that the real reason that no psychological evidence was introduced at the penalty phase was that counsel either never considered doing so or had failed to complete a thorough investigation which would have uncovered such evidence. This failure to pursue evidence was therefore not based upon a reasonable tactical decision of counsel, and was therefore ineffective. See, Burger v. Kemp, _____ U.S. _____, 107 S.Ct. 3114, 3124, 97 L.Ed.2d 638 (1987) (reasonable decision that psychological evidence

should not be used not ineffective); Profitt v. Waldron, supra, pg. 1102, at 1249 (failure to investigate psychological background where insanity was the only available defense was ineffective under Strickland.)

[3] Having determined that counsel's performance at the penalty phase did not measure up to the first Strickland plank, the Court must now decide whether the petitioner was prejudiced by counsel's failure to pursue this evidence. In determining whether prejudice exists, the Court must determine whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. - Strickland, supra, pg. 1100, at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In this

case, the Court cannot say that there is a reasonable probability that the psychological evidence which would have been presented would have changed the outcome of the penalty phase.

At the evidentiary hearing held by this Court, the respondents presented the testimony of Dr. Master, a psychiatrist from Las Vegas familiar with the petitioner's case. Dr. Master interviewed the petitioner in 1977 at the request of Mr. Ahlswede, who had obtained a court order for such an examination. In Dr. Master's opinion, the petitioner has an anti-social personality, which is unrelated to mental illness. Specifically, Dr. Master indicated that the petitioner lied at various times during the examination in order to make his story more likely to result in a finding of mental illness. Further, Dr. Master indicated that the petitioner

lacked the classic symptoms of psychosis: hallucinations; inability to think logically; and loss of memory. Based upon his review of the petitioner, the witness found the petitioner in 1977 not to suffer from any mental illness. This opinion was conveyed to Mr. Ahlswede.

Dr. Master did not have available to him in 1977 the New York medical records and other psychiatric history in dispute here. He did, however, review these documents before testifying at this Court's hearing. Based upon that review, Dr. Master found that the 1963 New York diagnosis of the petitioner's mental illness was mistaken. His conclusion was that the state of psychiatry, especially where alcohol related disfunctions are concerned, has advanced significantly since the 1960s, when the petitioner was first diagnosed as having a mental illness. Dr. Master reemphasized that

the diagnosis in 1963 of schizophrenia was correct to the extent of psychiatric knowledge at the time. Taking into account recent advances in the field, however, the witness found the old diagnosis unacceptable. Additionally, Dr. Master interpreted the early EEG, and found that it was actually normal. He did indicate that portions of the EEG tape were illegible, and that that could have accounted for the early diagnosis of organic brain disfunction. Thus, Dr. Master disagreed with the finding of the New York hospitals that the petitioner suffered from a mental illness. Instead, Dr. Master stated that the petitioner was a violent individual who lacks a social conscience.

Dr. Master also disagreed with Dr. O'Gorman, the psychiatrist who had examined the petitioner in 1977. As stated above, Dr. O'Gorman testified in

the state post-conviction proceedings that the petitioner did suffer from an organic brain disfunction. Although Dr. Master indicated that he has a great deal of respect for Dr. O'Gorman, he did testify that O'Gorman's diagnosis of organicity was mere speculation. Dr. Master pointed to the weight of psychiatric evidence he had previously discussed, and stated that the previous diagnoses of organicity were unfounded.

Thus, it appears that the petitioner would not have gained much if Mr. Ahlswede had investigated his psychiatric background to the extent required by Strickland. The substantial weight of the psychiatric evidence presented to this Court indicates that the petitioner is not mentally ill, and that he instead lacks a social conscience. The Court is aware that the petitioner need not have been diagnosed as having a full fledged

mental illness in order for the psychiatric evidence to help avoid the death penalty. In this case, however, it appears that the evidence would have stood an equal chance of harming the petitioner's case more than it helped. A jury, presented with evidence tending to show that the petitioner was abused as a child, and that he failed to develop normal social senses, could easily find that these facts did not outweigh the aggravating circumstances presented by the state. Indeed, it seems likely that telling the jury that the petitioner lacks a social conscience is likely to be found as an aggravating circumstance itself. See Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir.1986) (in a markedly similar case, the court found that the introduction of psychiatric evidence had an equal potential to tip the scale of justice toward death, instead of in the

petitioner's favor); Thompson v. Wainwright, 787 F.2d 1447, 1454 (11th Cir.1986), cert. denied, ____ U.S. ____, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987) (none of the psychiatric evidence presented indicated that the petitioner suffered from a specific disturbance at the time of the crime which might have mitigated his participation); cf., Armstrong v. Dugger, 833 F.2d 1430, 1434 (11th Cir.1987) (prejudice found where evidence indicated that the petitioner suffered from epileptic seizures, organic brain damage, and mental retardation). In light of the extremely equivocal nature of the psychiatric evidence which the jury in this case would have heard, the Court cannot say that there is a reasonable probability that the outcome of the penalty phase hearing would have been different had the evidence been produced.

This conclusion is buttressed by the evidence of aggravating circumstances which the jury did hear. Specifically, the jury heard evidence that the petitioner had committed one other violent sexual assault. In addition, it heard evidence that the murder was committed during the commission of another felony--namely, robbery. Further, the prosecution introduced evidence of the violence which was involved in the killing of the victim of this murder. Specifically, the jury learned that the petitioner smashed the victim's head in with a rock or other hard object with such violence as to render the head almost unrecognizable. In addition, there was testimony that the petitioner sexually assaulted the victim while she was alive or dead. In view of the fairly heinous nature of the crime in this case, it seems unlikely that such

weak psychiatric evidence would have spared the petitioner from the death penalty. Thompson v. Wainwright, supra, pg. 1100, at 1453 (where testimony of the brutal torture murder of the victim was presented to the jury, there was no reasonable probability that psychiatric evidence would have altered the jury's decision); Celestine v. Blackburn, 750 F.2d 353, 358 (5th Cir.1984), cert. denied, 472 U.S. 1022, 105 S.Ct. 3490, 87 L.Ed.2d 624 (1985) (potentially mitigating psychiatric evidence held no reasonable probability of affecting the jury's decision in light of grisly aggravating circumstances). The heavy weight of the aggravating circumstances in this case would have been unaltered by the presentation of the overlooked psychiatric evidence. These counts therefore fail to meet plan [sic] two of the Strickland test.

COUNT 1(l)

[4] In this count, the petitioner argues that Ahlswede was ineffective for failing to call the petitioner or any other person as penalty phase witnesses. As stated above, the question for ineffective assistance of counsel is whether counsel made a reasonable decision not to put the petitioner or other individuals on the stand at the penalty phase. In this case, it does not appear that petitioner's testimony would have had any effect on the sentence if he had testified, and that the prejudice plank is missing from the Strickland analysis. See Strickland v. Washington, supra, pg. 1100, at 697, 104 S.Ct. at 2069 (court can forego determination of ineffectiveness plank if it is easier to dispose of claim on the ground of lack of sufficient prejudice).

With respect to the petitioner's testimony, it is clear that there was no prejudice in failing to put him on the stand at the penalty phase. The petitioner argues that he would have stated that he remembered arguing with the victim, that he had been drinking and smoking marijuana, and that he blacked out. Further, the petitioner would have testified that he did not intentionally hurt anyone. It appears to the Court that there is no reasonable probability that this testimony would have affected the outcome of the penalty phase. As noted above, the aggravating circumstances found by the jury were both multiple and severe. In view of the heavy weight of these circumstances, the testimony of the petitioner is highly unlikely to have and any effect at all. There was therefore no prejudice in failing to present this testimony to the

jury. Cf., Thompson v. Wainwright, supra, pg. 1104.

[5] With respect to counsel's failure to present the testimony of other witnesses, the petitioner has failed to identify specifically who those witnesses would have been and what their proposed testimony would have shown. Without this information, it is impossible for the Court to examine the prejudice plank. In this regard, the petitioner has failed in his burden of proof. To the extent that the petitioner argues that counsel should have called psychiatric witnesses, including experts and/or family members, the Court has dealt with that issue above. This count therefore fails to establish any basis for relief.

COUNT 1(n)

[6] In the remaining ineffective assistance of counsel count, the petitioner argues that counsel's

concession of guilt and argument that the aggravating circumstances were not subject to dispute fell below the Strickland standards. This need not detain the Court for long. It is apparent from counsel's penalty phase argument that he was attempting to shift the focus dramatically to the only mitigating circumstance--mental illness. In so doing, it was almost required that counsel admit that the petitioner committed the act of murder. In addition, the thrust of counsel's argument was that no sane individual could have committed such a brutal slaying. Thus, it was also necessary not to dispute the aggravating circumstances. Counsel's argument was therefore part of an obvious strategy, and is not a basis for ineffective assistance of counsel. Wilson v. Butler, 813 F.2d 664, 671 (5th Cir.1987), cert. denied, _____ U.S. _____, 108 S.Ct.

1059, 98 L.Ed.2d 1021 (1988) (counsel's concession of guilt at penalty phase not ineffective where part of an obvious strategy).

COUNT 4

In this count, the petitioner argues that the aggravating circumstance of torture, depravity of mind, and mutilation of the victim was unconstitutional as applied to him. Citing Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the petitioner argues that this particular aggravating circumstance, and the instructions used to explain it, is unconstitutional as it gives no basis for distinguishing this case, in which the death penalty was imposed, from the many in which it was not. Id., at 433, 100 S.Ct. at 1767.

Nevada Revised Statutes § 200.033(9) provides that first degree murder may be

aggravated if the jury finds that the murder involved torture, depravity of mind, or the mutilation of the victim. In this case, the jury was specifically instructed as to the definition of each of the three elements of § 200.033(9).*

[7] As an initial matter, the Court finds that the jury instructions in this case were specific enough in their definition of the aggravating circumstances that the general problems described in Godfrey were avoided. In Godfrey, the state courts had simply used the terms "torture," "depravity of mind," and "mutilation" without giving them any more specific definition. It was this lack of further definition which resulted in the Court's finding these aggravating circumstances unconstitutionally vague. Id., at 419, 100 S.Ct. at 1759. In the present case, the specificity of the jury instructions removes this case from the

general unconstitutionally vague category.

[8] The petitioner further argues, however, that the individual definitional instructions themselves were unconstitutional. Regarding the depravity instruction, the petitioner argues that it allowed the jury to find an aggravating circumstance from the fact that the defendant was legally insane and unable to tell the difference between right and wrong or to appreciate the value of human life. It appears to the Court, however, that the depravity instruction given by the state courts is not so nearly coequivalent with an insanity instruction as the petitioner suggests. Legal insanity usually requires that the defendant suffer from a mental disease or defect which prevented him from understanding right and wrong. The depravity instruction does not reach

such a level of psychiatric sophistication. It merely requires that there be a "condition" of mind such that the defendant lacks a moral sense, and possesses an evil or vile state of mind. Where the concept of legal insanity seeks to destroy the intent necessary to commit a crime, therefore, this depravity instruction seeks to explain more fully the type of intent necessary for the death penalty.

In addition, as stated above, the Courts have recognized that the petitioner's psychiatric problems can be a two-edged sword. They have therefore held that it is not always prejudicial to leave such testimony out of penalty phase proceedings. See Whitley v. Bair, supra, pg. 1104. Similarly, there appears to be no constitutional impropriety in using the petitioner's depraved state of mind

as an aggravating circumstance against him.

The petitioner argues further that the mutilation instruction allowed the jury to find an aggravating circumstance from the "mere" fact that strangulation was the cause of death, rather than a "cleaner" cause, such as a gunshot wound. Initially, the Court notes that the probable cause of death was established as the severe and crushing blow to the side of the skull, which rent the victim's head open on the side. See Deutscher v. State, 95 Nev. 669, 601 P.2d 407, 410-411 (1979). Petitioner's characterization of the victim's cause of death as "mere" strangulation is thus factually inaccurate.

[9] Additionally, the petitioner had sexually abused the victim before or after killing her. There was evidence adduced at trial of sexual assault, and

of bite marks on the victim by the petitioner's teeth. It appears that all of the injuries inflicted upon the victim occurred while the victim was still alive, with the blow to the head being the last lethal injury. Id. From the evidence presented in this case, the Court finds that this was not the type of "ordinary" murder which the Godfrey court found ineligible for the death penalty.

Finally, the petitioner argues that none of the justifications for the death penalty should turn on the method of killing where the jury is instructed that the pain felt by the victim is irrelevant. The Court fails to see the constitutional reasoning behind this argument, and the petitioner cites no federal authority for this proposition. The task of the jury in the penalty phase is to determine whether the defendant's actions warrant his execution. In making

this determination, the method of killing is a critical factor. It may be that "clean" methods of murder, such as poison or firearms, do not suffice for the death penalty, where brutally beating the victim to death does. The brutality of the murder therefore has at least as much to do with the mind of the perpetrator as with the pain felt by the victim. That the jury was instructed to disregard the victim's pain is therefore of no moment. Count 4 thus states no basis for habeas relief. In addition, there was no prejudice in failing to raise these Godfrey claims. Count 1(d) is therefore also without merit.

COUNT 8

The petitioner finally argues that potential jurors were improperly excluded from the jury pool because of their views about the death penalty. Specifically, the petitioner argues that juror Gossard

should not have been excluded, because his views regarding the death penalty were equivocal, and he did not express his absolute opposition to capital punishment. Juror Norris should not have been excluded, in the petitioner's estimation, as the court did not ask the juror whether he would be able to set aside his personal convictions about the death penalty. Neither argument has merit.

[10] In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court refined the test for determining whether jurors who were opposed to the death penalty had been impermissibly excluded from capital juries. The court indicated that where a "juror's views would 'substantially impair the performance of his duties as a juror in accordance with instructions and his oath,'" the juror could properly be

excluded for cause. Id., at 424, 105 S.Ct. at 852 citing Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). In addition, the Witt court noted that the jurors bias against the death penalty need not be proved with "unmistakable clarity." Id. In view of this standard, neither of the two potential jurors was improperly excluded.

With respect to prospective juror Gossard, the transcript from the jury selection in the case shows that he harbored deep feelings against the death penalty which would have impaired his ability to function as a juror.

Q. (Mr. Ahlswede)

Now, following those guidelines, do you feel that in no case you could ever impose the death penalty, or do you feel that in a proper case, following those guidelines,

you might be able to impose the death penalty?

A. I don't think I could.

Q. Under no conditions?

A. No sir. I don't think I could.

* * * * * * * * * * * * * * * * * * *

Q. (Mr. Harmon)

But we need to have jurors who can consider objectively either the death penalty, life without the possibility of parole in the State Penitentiary, or life with the possibility of parole.

Now, my question is can you imagine any set of facts or circumstances where you feel that the punishment of death was proper?

A. I just put myself in this man's position. That's the only way I can look at it. And I would--I would just have to say from the time I lived, this time I lived in this

area, this time, I just--the death penalty is something I just can't--you know, I could probably make a suggestion, or I could probably deal with it, but I'm really--I guess I really am against the death penalty, you know. There is nothing else I can say.

Q. You are saying you no longer believe in it?

A. No.

Q. In other words, you would automatically, regardless of whatever evidence was presented, you would vote against it; is that what you are saying?

A. Yes. I'd probably have to go that way, Mr. Harmon.

* * * * * * * * * * * * * * * * * * * *

Q. (Mr. Ahlswede)

Could you imagine any circumstances--for example,

somebody, an individual going into a school and slaughtering 20 school children? In a situation like that, could impose the death penalty?

A. Well that's another thing. That's another thing that raises a question, if a man does this, I--I look at it today that nine times out of ten, he's--he's doing this, there's something wrong with him.

Now, I mean, there, if he's going to go in and kill somebody, there must be something, psychiatric problem, or it could be anything at the spur of the moment. Am I supposed to take the man's life? Am I supposed to say he's wrong?

Sure, he's wrong, but where do we all--I mean, lots of us would go off the deep end at some time in our lives. I'm not perfect, and a lot of people are not.

Have to weigh the differences. Might be rehabilitation, might be--sometimes he could be put away nine times out of ten.

The death penalty might work in some cases, but I've seen a lot of times where the death penalty did not, creates a problem, because you hang a man, kill a man, another man takes his place. It's all over again, repertory (sic) of the act.

I don't know really what the guidelines are. I guess newspapers are our worst enemy to some of the people. We read it, we believe it, and so we have to live with it.

Q. So you are saying that you could never under any circumstances at any time impose a death penalty on an individual, no matter how awful the crime was?

A. I never been able to since a few things happened in my life. I just--I just couldn't do it.

The juror's answers to counsel's questions unmistakably indicate his opposition to the death penalty, and his inability to apply it under any circumstances.

The petitioner argues, however, that the juror's somewhat ambivalent response to Mr. Ahlswede's hypothetical involving the 20 school children did not make him a candidate for exclusion under Witherspoon. Perhaps the immediate response to that hypothetical would give the Court pause in this regard. Reading the juror's entire response to that question, however, shows that he was unequivocal in his opposition to the death penalty, and that he would never be able to apply it, regardless of the circumstances. This juror was therefore

properly excluded, as his answers to the relevant questions proved that his opinions regarding the death penalty would have prevented or substantially impaired his ability to perform as a juror.

Prospective juror Norris was also properly excluded. The petitioner argues, however, that the juror was never asked whether he would be able to set aside his personal prejudice and follow the instructions of the court. Review of the transcript reveals that the juror was never specifically asked this question. It does appear from that record, however, that the juror's bias against the death penalty was so evident that this specific question need not have been asked.

> A. I believe that if a man is found guilty, I could send him to prison for life, but not--not the gas chamber.

Q. (Mr. Ahlswede)

Do you feel that you could never under any circumstances send anyone to the gas chamber?

A. No, I could never.

The prospective juror's answers were clear and unequivocal regarding his feeling about capital punishment. Asking his questions regarding the judge's instructions appears to have been unnecessary.

It nevertheless appears that questions from the state effectively asked the juror whether he would be able to follow the judge's instructions and set aside his personal bias.

Q. (Mr. Harmon)

But as Mr. Ahlswede set out, if a jury found--the State, as you know, has to prove guilt beyond a reasonable doubt. The Court will tell you what that means legally in

this state, and that is the yardstick that you would use to measure, "Did the State establish beyond a reasonable doubt that that man is guilty of murder in the first degree?"

Then, after that's done, there will be another penalty trial to which there will be probably additional evidence offered, and then the Court would again instruct you as to "This is the yardstick. You determine whether you and 11 other people think that this crime committed by this man of first-degree, if you find that he is guilty of first degree, is worth of, or should the proper penalty be death?"

What I am asking you is could you, with an open mind, look at it, see first if you thought that the proper

penalty would be death, and then, if with an open mind you along with your 11 other jurors felt that death was the proper penalty, could vote to impose that penalty on that man sitting right there?

A. I--I don't believe I could just send no one to death. I just don't.

* * * * * * * * * * * * * * * * * * *

Let me say that I'm not a very religious person, but I do believe in the Bible, and the Bible says thou shalt not kill. I just feel like if I could do that, I'm killing someone.

The questions asked by the state thus placed before the juror the role of the judge in giving instructions, and the role of jurors in following those instructions. In response to that question, the juror nonetheless indicated that he could never impose the death

penalty, regardless of the "yardstick" given by the judge. The relevant question does appear to have been asked of this juror, therefore. His bias against capital punishment would also have prevented or substantially impaired his ability to function as a juror. There was therefore no Witherspoon error in excusing this juror.

IT IS, THEREFORE, HEREBY ORDERED that the petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

IT IS FURTHER ORDERED that the stay of execution entered by the Court in this case shall continue for thirty days from the date of this order, so that petitioner may perfect his appeal, if so desired. At the end of that thirty days, the stay shall expire.

*The jury was instructed as follows:

INSTRUCTION NO. 21 (torture)

The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose. The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased nor does it necessarily require any proof that the deceased suffered any pain.

INSTRUCTION NO. 22 (depravity of mind)
The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind which is outrageously, wantonly vile, horrible, or inhuman.

INSTRUCTION NO. 23 (mutilation of victim)
You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make it imperfect.

APPENDIX E

IN THE SUPREME COURT OF THE

STATE OF NEVADA

HENRY DEUTSCHER,	)	No. 10434
	)	
Appellant,	)	
	)	
v.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

October 18, 1979 601 P.2d 407

OPINION

By the Court, MANOUKIAN, J.:

This appeal is from felony convictions of first degree murder, NRS 200.010 and 200.030, and robbery without the use of a deadly weapon, NRS 200.380, resulting in a death sentence and a consecutive fifteen-year penalty respectively.

Appellant proffers several bases for reversal contending that (1) Nevada's capital punishment statutes are constitutionally infirm; (2) the trial

court erred in instructing the jury that it could consider an aggravating circumstance absent respondent's failure to give statutory notice of the circumstance prior to the penalty hearing; (3) his pre-arraignment inculpatory statements made during detention were improperly admitted; (4) probable cause for the arrest was lacking making inadmissible evidence obtained incident thereto; (5) his fifth amendment right to silence was violated due to witness and prosecutorial misconduct; (6) prejudicial privileged and hearsay evidence should not have been admitted; (7) the trial court erred in its refusal to order a police officer to disclose his home address; (8) the evidence is insufficient to support the sentencing jury's findings of aggravating circumstances as required by NRS 177.055; (9) the trial court was without

jurisdiction to proceed with the penalty hearing; and (10) error was committed when the trial court, during the penalty proceeding, instructed the jury using an obsolete statutory term. We find no reversible error and affirm.

On the morning of August 16, 1977, the body of Darlene Joyce Miller, 37, was discovered on a desert road off North Nellis Boulevard behind Weaver Construction Company in Las Vegas. Her white 1976 Cadillac with Texas license plates was parked nearby. She was nude except for a blouse and bra that had been pulled open around her shoulders. Her legs were spread apart and there was smeared blood between her upper thighs. She had superficial lacerations and abrasions on her breasts and abdomen which experts testified represented bite marks. Her neck, face and head were severely bruised, bearing extensive

abrasive-type injuries. Her head had a large depression skull fracture two and three-fourths inches in diameter caused by a crushing or blunt type object. A trail of dripped blood led from the crime scene to nearby North Nellis Boulevard, an arterial highway.

Sergeant Samolovitch of the Las Vegas Metropolitan Police Department, the officer in charge of the investigation, was informed by another officer that the victim's car had been parked the previous night approximately one-half mile away in front of the Wagon Wheel Bar on Nellis Boulevard. Upon questioning the bar owner, it was determined that the appellant had been seen with the victim in her automobile, leaving the bar at 2:00 a.m. the morning of August 16, 1977. Appellant was also seen in the vicinity of the bar by his former employer at approximately 6:00 a.m. The victim's

body was discovered that morning at 6:30 a.m.

Appellant resided at a motel, also on Nellis Boulevard, which was located approximately one-half mile from both the bar and crime scene. After speaking with appellant's wife at the motel, the investigators went to Deutscher's place of employment to question him. Arriving at about 10:00 a.m., Sergeant Samolovitch noticed a ragged, fresh cut on Deutscher's hand and observed that he appeared nervous, cold and clammy. Sergeant Samolovitch advised appellant that he was under arrest for murder and gave him the Miranda warning.[1]

Deutscher was taken to the police station where he was again advised of his rights and signed a rights advisory card. Appellant was then questioned by the police; he admitted being in the victim's car, but initially denied any

responsibility for the murder. When Deutscher was asked if he had any money he took out his wallet and removed two fifty dollar bills. The two bills appeared to be stained with blood. When asked how the money became stained, appellant did not respond.

After Deutscher was transported to the Clark County Jail on August 16, he was fingerprinted and also consented in writing to a search in the form of dental impressions. Blood samples and fingernail scrapings were also obtained from him.

During a brief interrogation on August 18, 1977, Deutscher admitted killing the victim, but because he wanted to see his wife before making a full statement, the interview was interrupted and his wife was called. After speaking with his wife, a video taped statement was taken that afternoon with Deutscher,

his wife, and several officers present. In this statement, appellant admitted having beaten the victim, describing the crimes in detail.

Appellant had been in custody from 10:00 a.m. Monday, August 16, the date of the offense, until 4:00 p.m. Wednesday, August 18, when the incriminating statement was given. He was arraigned before a magistrate on August 22.

Pertinent evidence at trial included Deutscher's fingerprints in the victim's car, blood of the victim's blood type under the appellant's fingernails, blood at the crime scene of both the victim's and Deutscher's blood type, and identification of the bite marks on the victim as being made by the appellant's teeth. The victim's husband testified that his wife had been carrying two fifty dollar bills, along with other smaller bills in her purse. The two larger bills

were not in her purse when the body was found. The appellant's clothes and boots were located by police as a result of his confession, and the size, shape and sole pattern of the boots were consistent with those impressions taken at the crime scene. Deutscher's pants, undershorts, and shirt were stained with human blood.

A forensic pathologist testified as to the extent of injuries which the victim incurred, finding no evidence of recent sexual intercourse. The expert did testify that the victim had been strangled and that all the injuries were inflicted while the victim was still alive with the blow causing the two and three-fourths inch diameter hole to the left side of her head being the last and probable "lethal" injury.

Prior to trial, the state served upon the appellant a Notice of Intent to Seek Death Penalty, setting forth certain

aggravating circumstances. These aggravating circumstances did not include the circumstance that the appellant had committed murder in an attempt to commit a sexual assault.

The jury found the appellant guilty of first degree murder and robbery. A penalty hearing was held and the jury was instructed on what they might consider as aggravating and mitigating circumstances in determining the penalty.[2] Over appellant's objection, an instruction was given which provided that the jury could consider the attempt to commit a sexual assault an aggravating circumstance.

The jury concluded that (1) the murder was committed by appellant who was previously convicted of a felony involving the use or threat of violence to the person of another;[3] (2) the murder was committed while the appellant was engaged in the commission of or an

attempt to commit any forcible sexual assault; and (3) the murder involved torture, depravity of mind, or the mutilation of the victim. No mitigating circumstances were designated, the jury simply determining that they did not outweigh the aggravating circumstances.[4]

1. The Death Penalty.

Appellant contends that the death penalty statute is unconstitutionally vague and therefore violative of due process and equal protection as the sentencing procedure permits juries untrammeled discretion in imposing death sentences. See Furman v. Georgia, 408 U.S. 238 (1972).

Nevada's capital punishment law was amended in 1977 with inconsequential revision from the death penalty statutes in Georgia and Florida. Georgia and Florida statutes survived constitutional scrutiny by the United States Supreme

Court and satisfied the constitutional deficiencies enunciated in Furman. Gregg v. Georgia, 428 U.S. 153, 196-207 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53 (1976).

Confronted by an eighth amendment challenge, we have recently held that Nevada's death penalty statutes (NRS 175.552-.562) are constitutional because they "provide for a consideration of any mitigating factor the defendant may want to present." Bishop v. State, 95 Nev. 511, 597 P.2d 273, 277 (1979). See also Gregg v. Georgia, 428 U.S. at 196-97; Proffitt v. Florida, 428 U.S. at 257-58; Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978).

The appellant further contends that the death penalty statute is impermissibly vague because an aggravating circumstance for imposition of the death penalty is that "[t]he

murder involved torture, depravity of the mind, or mutilation of the victim." NRS 200.033(8). These claims were not presented for review in Bishop or Shuman; however, similar aggravating circumstances would provide adequate guidance to the jury. In the instant case, we find the legislative enactment to be plain and intelligible. See Sheriff v. Smith, 91 Nev. 729, 542 P.2d 440 (1975). Moreover, the district court meticulously defined for the sentencing panel, the terms "torture," "depravity," and "multilation [sic]"[5] and the jury was therefore provided adequate guidance for the application of the aggravating circumstances. Gregg v. Georgia, 428 U.S. at 196-97; Proffitt v. Florida, 428 U.S. at 257-58. Moreover, it is well settled that statutes are entitled to all presumptions in favor of validity. Cummings v. City of Las Vegas Mun. Corp.,

88 Nev. 479, 481, 499 P.2d 650, 652 (1972). We find no error.

2. Sexual Assault as an Aggravating Circumstance.

The appellant contends that the respondent should have formally notified him, under the provisions of NRS 175.552,[6] that murder committed in the perpetration of a sexual assault would be offered as an aggravating circumstance at the penalty hearing.

We believe that the purpose of the statute is to provide the accused notice and to insure due process so he can meet any new evidence which may be presented during the penalty hearing. Here, evidence was admitted at trial which showed the aggravated nature of the crime committed. The appellant was thus afforded ample notice regarding elements and proof of the offense itself when these were offered during the guilt

phase. Eberheart v. State, 206 S.E.2d 12, 17 (Ga. 1974). The notice provisions of the statute were plainly not offended by the admission of the challenged evidence relating to the aggravating circumstance as the sexual assault was germane to the proof of the crime itself. Furthermore, an instruction regarding sexual assault was given at trial. The accused need not be independently informed of the intended use of this factor during the sentencing hearing. Hooks v. State, 210 S.E.2d 668, 670 (Ga. 1974); Eberheart v. State, 206 S.E.2d at 17; NRS 175.554(1).

3. The Inculpatory Statements Made During Pre-Arraignment Detention.

Appellant next contends that his incriminating statements given to police are inadmissible because, although they were given after his arrest, they preceded his arraignment. Our statutory

scheme has long provided that an accused must be taken before a magistrate "without unnecessary delay." NRS 171.178. But while this court has recognized the statutory requirement, we have also held that in the absence of a statutorily-fixed period of time, a reasonable time is presumed before an arraignment must be conducted.[7] Tellis v. Sheriff, 85 Nev. 557, 560, 459 P.2d 364, 365 (1969). And the mere passage of time, in the absence of prejudice to the defendant, does not constitute a deprivation of a defendant's rights. Id. Appellant was held in custody six days before his arraignment; however, he confessed to the crime after two and one-half days of detention. We find no prejudice as appellant was constantly advised of his rights and acknowledged that he understood them.

In McNabb v. United States, 318 U.S. 332 (1942), and Mallory v. United States, 354 U.S. 449 (1957), confessions which resulted from an unreasonable pre-arraignment detention were excluded be cause the confessions resulted from a flagrant disregard of federal procedure. Although we are not bound by these decisions which deal with federal criminal procedure, it is clear that they were intended to avoid the adhesive practices which would spawn from administrative detention without judicial examination. Culombe v. Connecticut, 367 U.S. 568, 584-85 (1960). It has been held, however, that these fears are not valid when an accused, as here, makes a voluntary confession after being fully informed of his Miranda rights. Appellant was informed of his Miranda rights on several occasions prior to his confession, signed a waiver card and

acknowledged that he fully understood the import of the waiver. Moreover, the Miranda warning was amplified by the L.V.M.P.D. detectives as follows:

> I advised Mr. Deutscher that he had the right to remain silent; that anything he said could and would be used against him in a court of law; that he had a right to an attorney; if he could not afford one, one would be provided for him free of charge before any questioning.
>
> I also advised him that if he agreed to talk to us, at any time during that interview he wished to revoke those rights, he had a right also to do that.
>
> Asked him if he understood what I was telling him, that he understood these rights, and he indicated in the affirmative.

Additionally, the several interrogations were of reasonable duration, conducted in a reasonable atmosphere and no irregularities were discernible from the record.

We subscribe to the rule of law which provides that when an accused voluntarily waives his right to silence and his right to counsel, he concurrently waives his right to be seasonably arraigned. United States v. Indian Boy X, 565 F.2d 585, 591 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978); United States v. Woods, 468 F.2d 1024, 1026 (9th Cir. 1972), cert. denied, 409 U.S. 1045 (1972); Pettyjohn v. United States, 419 F.2d 651, 655-56 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970). The reason for this rule is that the primary purpose of an arraignment is to inform the defendant of his rights. But a delay in arraignment is not prejudicial when a

defendant has already been advised of his rights, was promptly so advised, and voluntarily waived those rights. See Pettyjohn v. United States, 419 F.2d at 655-56. This is particularly so when the delay is not flagrant and the record is silent relative to any other irregularities which go to the issue of voluntariness. Cf. McNabb v. United States, 318 U.S. at 334-38 (in which defendants in a custodial setting, were interrogated for periods of time in discomfort and without counsel and advice as to the right to counsel; confessions held inadmissible).

Because the voluntary nature of a confession is the primary test for admissibility, State v. Boudreau, 67 Nev. 36, 46, 214 P.2d 135, 141 (1950), we now focus on whether the pre-arraignment delay affected the voluntariness of appellant's confession. The appellant

only feebly challenges voluntariness here. In reviewing the particular circumstances gleaned from the record surrounding the statements and resulting confession, including the education, experience and conduct of the accused, as well as the credibility of the police officers, it is patent that the waivers were voluntary. The subsequent delay in arraignment did not retroactively result in prejudice so that appellant's rights were violated. Morgan v. Sheriff, 92 Nev. 544, 546, 554 P.2d 733, 735 (1976); Brown v. Justice's Court, 83 Nev. 272, 276, 428 P.2d 376, 378 (1967).

4. Probable Cause.

The challenge by appellant of the existence of probable cause for his arrest is also without merit. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge at the time of arrest would

warrant a prudent person in entertaining an honest and strong suspicion that the person arrested has committed a crime. Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Gordon v. State, 83 Nev. 177, 179, 426 P.2d 424, 425 (1967); Schnepp v. State, 82 Nev. 257, 260, 415 P.2d 619, 621 (1966). The presence or absence of probable cause is determined in light of all the circumstances and can include conduct of the defendant in the presence of the police officers. A Minor v. State, 91 Nev. 456, 462, 537 P.2d 477, 481 (1975); Schnepp v. State, 82 Nev. at 260, 415 P.2d at 621.

Sergeant Samolovitch testified as to the factual basis upon which his decision to arrest was made: (1) The appellant was seen leaving the Wagon Wheel Bar with the victim the morning of the crime in a car found close to the scene; (2) He knew Deutscher resided at a motel which was

close to the bar and the crime scene; (3) A trail of dripped blood led away from the crime scene to Nellis Boulevard; (4) He observed a fresh cut on appellant's finger when he approached him at his place of employment the morning of the crime; and (5) The appellant appeared very nervous, cold, and clammy when he was approached by the officer. It is arguable that each of these circumstances, when taken by themselves, is consistent with innocence. But here, the cumulative suspicion produced by the totality of the circumstances warranted the finding by the lower court of probable cause to arrest. A Minor v. State, 91 Nev. at 462, 537 P.2d at 480; Schnepp v. State, 82 Nev. at 260-61; 415 P.2d at 621.

5. The Defendant's Fifth Amendment Right to Remain Silent.

Appellant claims there were two occasions during the trial where his fifth amendment right to remain silent was violated. He asserts the first error occurred during Detective Levos' testimony concerning the red-stained fifty dollar bills found in appellant's possession upon which the appellant refused to comment. Following timely objection, the jury was admonished to disregard the testimony.

Although a comment on a failure to respond can be reversible error, the comment must be more than a mere passing reference and an accused must be prejudiced by the remark to mandate reversal. Shepp v. State, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971); see Layton v. State, 87 Nev. 598, 600, 491 P.2d 45, 47 (1971). Clearly, this was not a

purposeful comment by the prosecutor. Cf. Layton v. State, 87 Nev. at 600, 491 P.2d at 47 (prosecutor made prejudicial comment in closing argument respecting defendant's silence). The comment here was by a witness and was a supplemental comment to the answer already given.[8] Considering the vague, passing nature of the remark, coupled with the admonishment, no prejudice to the appellant is shown. Layton v. State, 87 Nev. at 600, 491 P.2d at 47; Shepp v. State, 87 Nev. at 181, 484 P.2d at 564.

The second comment occurred during the prosecutor's final argument when he said, "[The defendant] testified he then -- excuse me. He stated during the video interview . . . ." This vague reference to the appellant's confession cannot be construed as a direct reference to his failure to testify. Layton v. State, 87 Nev. at 600, 491 P.2d at 47. The

established test is whether the language was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to [respond]." Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955). This non-deliberate, self-corrected statement by the prosecutor does not constitute a sufficient comment to mandate reversal. See Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

The final remark, which was made during the state's closing argument, was, "He can sit there and not open his mouth." Our review shows that this remark was in the context of a discussion of the state's burden of proof. Even though the remark may be improper when taken in context, it becomes inconsequential when, as here, the verdicts are free from doubt. Dearman v.

State, 93 Nev. 364, 369, 566 P.2d 407, 410 (1977). The error, if any, on this record of guilt, is harmless beyond a reasonable doubt. Chapman v. California, 486 U.S. 18, 21-24 (1967).

6. The Hearsay and Privileged Statements.

Appellant contends that inadmissible evidence was admitted during the jury's hearing of a portion of the video taped statement. The challenged testimony consists of remarks by Detective Levos during the video interrogation regarding comments appellant's wife made to police officers.[9] The appellant asserts that the statements are inadmissible because they are privileged spousal communications, as well as hearsay.

Appellant contends that the officer is placing testimony before the jury indirectly when the wife could not testify against her husband. The spousal

privilege,[10] however, is intended to protect confidential communications between spouses, not communications between a spouse and third parties. Foss v. State, 92 Nev. 163, 167-68, 547 P.2d 688, 691 (1976). The privilege cannot be applied to protect communications disclosed, as here, by strangers. State v. Lindley, 502 P.2d 390, 392 (Or.App. 1972).

Hearsay evidence is evidence of a statement made other than by a witness while testifying at the hearing, which is offered to prove the truth of the matter asserted. NRS 51.035. It is inadmissible unless it comes within an exception. NRS 51.065. Respondent argues that the statements made by the police officer in the video taped interview concerning what appellant's wife had said were not admitted to prove the truth of what the wife had said.

Without citing authority, the state contends that the officer's statements "were merely relevant to setting the scene and establishing the circumstances under which the defendant's incriminating statement evolved. It was the statement of the defendant, and not the officer's statements to the defendant, which was offered into evidence." We cannot agree with the state based on the record before us.

Traditionally, hearsay evidence has been excluded because it is not subject to the usual tests to show the credibility of the declarant. Lacking is cross-examination to ascertain a declarant's perception, memory and truthfulness. Moore v. United States, 429 U.S. 20, 21-22 (1976) (per curiam); Donelly v. United States, 228 U.S. 243, 273 (1913). The same problems are present here as to two declarants.

First, it is the officer on a video tape making a statement as to what he was told by appellant's wife. Second, the wife has allegedly made certain statements as to appellant's whereabouts on the night of the murder. Appellant's wife was not subject to cross-examination to discover if she indeed said this or as to her memory. Although the officer could have been questioned as to the accuracy of his recollection, it is apparent he was basing his knowledge of appellant's whereabouts upon what someone else had informed him. This is inadmissible hearsay. Toti Contracting Co. v. A. J. Orlando Contracting Co., 181 A.2d 594, 596 (Conn. 1962). Indeed, both of these statements were hearsay. See Archibald v. State, 77 Nev. 301, 307, 362 P.2d 721, 723-24 (1961); Cf. Alexander v. State, 84 Nev. 737, 449 P.2d 153 (1968) (defendant's testimony as to what a

friend had said was hearsay). Together, these statements constituted multiple hearsay.

We perceive no hearsay exceptions to what appellant's wife said, let alone what the officer has stated. See NRS 51.065-.375. Additionally, it cannot seriously be argued that the purpose was only to show that the statements were made or conversation had or that they were to show the circumstances of appellant's statements. The officer had even said to the appellant, "Henry, your wife is present in the room. . . . Are you going to make a liar out of her?" If the purpose of these statements was merely to show the surrounding circumstances, we believe they would have been irrelevant. The statements by appellant himself could have and should have been admitted by themselves.

We must now determine whether the admission of these hearsay statements was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24 (1967); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970); NRS 177.255, 178.598. We note that whether or not appellant's wife did in fact make the statements, there is other uncontradicted evidence placing the appellant at the Wagon Wheel Bar after midnight. Appellant was seen leaving the bar with the victim at approximately 2 a.m. and he was seen near the bar and not far from the murder scene at 6 a.m., shortly before the body of the victim was discovered. In addition, there is overwhelming evidence of appellant's guilt as shown by appellant's possession of two blood-stained fifty dollar bills and testimony by the victim's husband that the victim had two fifty dollar

bills on her person before she was killed. The appellant appeared to have been in need of money; he was quite familiar with the scene of the crimes and entire area whereas the victim was not; there were bootmarks at the scene which matched boots appellant had discarded and an expert testified that the bite marks on the victim were made by appellant. Moreover, blood found at the scene matched the blood-type of the appellant and the blood in the fingernail scrapings taken from appellant was of the same blood type as that of the victim.

All of this is extremely convincing even without regard to appellant's confession or the statement of appellant's wife.[11] While these statements by the wife should have been excluded, we hold that the error was harmless beyond a reasonable doubt as there was other undisputed inculpatory

evidence concerning appellant's whereabouts on the night in question, cf. State v. Rover, 13 Nev. 17, 24-25 (1878) (Beatty, J., concurring) (admission of evidence not harmful where other evidence already established fact), and overwhelming evidence of his guilt. Hendee v. State, 92 Nev. 669, 670, 557 P.2d 275, 276 (1976) (per curiam); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970).

7. The Inquiry into the Detective's Residence.

On cross-examination appellant attempted to ascertain the residential address of Detective Lee. Appellant contends that the trial court's refusal to order disclosure infringed upon his sixth amendment right to confront witnesses. See Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931). In Brown v. State,

94 Nev. 393, 580 P.2d 947 (1978), we held that the accused's right to a meaningful cross-examination does not establish an absolute right for the disclosure of a witness' address, but rather we would look to the disclosures regarding personal and employment history made by the witness and the extent and nature of the cross-examination. Here, as in Brown, it is of importance that the witness is a police officer and not an informer in that the motive and background of the police officer differs considerably from an informer. United States v. Alston, 460 F.2d 48, 53 (5th Cir. 1972); People v. Pleasant, 244 N.W.2d 464, 466-67 (Mich.App. 1976).

Moreover, the witness gave his true name and occupation, and fully described his professional involvement with the appellant. The detective was also thoroughly cross-examined by defense

counsel who failed to make a showing how disclosure of the officer's address would make his cross-examination any more meaningful. There is no error.

8. Sufficiency of the Evidence to Support the Death Penalty.

We are required to review imposition of the death penalty pursuant to NRS 177.055 and must consider: "(a) Any errors enumerated by way of appeal; (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances; (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (d) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in this state, considering both the crime and the defendant." The appellant concedes that there is sufficient evidence to support the finding of the

first aggravating circumstance, a previous felony conviction involving violence. He contends, however, that the other aggravating circumstances are unsupportable and, without their support, the mitigating evidence outweighs the evidence in aggravation. We disagree.

NRS 200.034(4)(a) provides that only one aggravating circumstance is necessary for imposition of the death penalty. There is, however, substantial evidence to support the finding of the other aggravating circumstances. The attempted sexual assault is supported by such evidence as the victim's nearly nude body, the bloodstains on the victim's body and the appellant's undershorts, as well as the bite marks on the victim's abdomen, breasts, and in her vaginal area.

Similarly, there is substantial evidence to support a finding that the

murder involved torture, depravity of the mind, or mutilation of the victim. There is extensive evidence demonstrating the heinous, brutal nature of the beating which resulted in the death of Darlene Joyce Miller. Considering both the crime and the defendant, we conclude that the death penalty is not excessive or disproportionate to the penalty imposed in similar cases in this state. E.g., State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). See Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965). Cf. Briano v. State, 94 Nev. 422, 581 P.2d 5 (1978) (life imprisonment); Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960) (life imprisonment).

Lastly, appellant contends that "the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor." NRS 177.055(2)(c).

The record is devoid of any such evidence.

9. Penalty Hearing Jurisdiction.

Appellant next contends that the trial court was without jurisdiction to conduct the penalty hearing because Chapter 598 of the 1977 statutory amendments, 1977 Nev. Stats. ch. 598, at 1626, repealed the provisions of Chapter 585 of the same amendments, 1977 Nev. Stats. ch. 585, at 1541 (amending NRS 200.030), which prescribed the circumstances under which the capital penalty may be imposed for first degree murder. Both enactments came during the 1977 session, with Chapter 598 passing three days after Chapter 585. There is nothing in the sexual assault legislation which indicates a repeal of the capital punishment law. Indeed, the legislative scheme shows that the two laws are completely separate. Additionally, both

laws went into effect simultaneously on July 1, 1977 pursuant to statute. NRS 218.530. Repeals by implication are disfavored. Ronnow v. City of Las Vegas, 57 Nev. 332, 364, 65 P.2d 133, 145 (1937). We decline to find either an express or implied repeal of Chapter 585.

10. Statutory Terms.

Finally, appellant apparently contends that the trial court committed reversible error when it instructed the jury, using the term "rape" instead of the new phrase "sexual assault." On this record, we perceive no error. State v. Murray, 67 Nev. 131, 47-48, 215 P.2d 265, 273-74 (1950). Although the court used the language of the statute before its amendment, NRS 200.5011 (amended 1977), there is no showing that the use of the term "rape" misled the jury as to a matter of law.

We affirm the convictions of first degree murder and robbery, together with the judgments and sentences of death plus fifteen years.

MOWBRAY, C.J., and THOMPSON, J., concur.

BATJER, J., concurring:

I concur in the result.

GUNDERSON, J., concurring:

I also concur in the result only.

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[1] Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

[2] In this factual context Nevada law provides that the penalty panel may return verdicts of death, or life with or without the possibility of parole. NRS 200.030(4).

[3] The previous felony conviction was for attempted sodomy and assault in the second degree, filed in Suffolk County, New York, October 23, 1968.

[4] At the hearings during the penalty phase, the prosecution introduced the testimony of three witnesses. When the state rested, the court inquired of defense counsel whether there were "any mitigation witnesses at this time other than the evidence that was evidenced in the trial?" Counsel replied there were

not and rested. The only mitigating factor to which counsel referred in closing was conclusory--namely, that the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance. The argument was that the acts were the product of a diseased mind in that they were so brutal.

[5] Instruction No. 21:

> The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.
>
> The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased nor does it necessarily require any proof that the deceased suffered pain.

Instruction No. 22:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Instruction No. 23:

> You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect.

[6] NRS 175.552 provides:

> The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravating nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing. (Emphasis added.)

[7] In 1979, the Nevada Legislature amended NRS 171.178 and provided for a hearing if an arrested person is not brought before a magistrate within seventy-two hours after arrest. At that time, it will be determined whether a defendant may be released if the person "was not brought before a magistrate without unnecessary delay." 1979 Nev. Stats. ch. 589, § 1, at 1191. Although not applicable to this case, the amendment demonstrates that no fixed time is necessarily prejudicial. Additionally, appellant here, fully informed of his rights, confessed within seventy-two hours of his arrest. No other evidence was obtained from appellant prior to the arraignment and subsequent to these statements.

It is noteworthy that by the time of the trial of this proceeding, Clark County had established the position of intake officer who has the responsibility of assisting an accused detainee by advising him of his various

constitutional and legal rights. This includes information as to bail and "anything that would help them to appear in court, and they give them the date of their arraignment when they're to appear in Justice Court, and they fill out this sheet which helps determine if they need an attorney or public defender . . . ."

[8] The deputy district attorney was questioning Detective Levos regarding his interview of the appellant:

"Q. Did you ask him how the stains got on the two fifty dollar bills?

"A. I did.

"Q. What did you ask him in that regard?

"A. I asked him--I said, 'Then where did the stains from--on the money come from?'

"He didn't answer me."

Defense counsel made an objection, following which the reference to defendant's silence was stricken and the jury admonished. It should be noted, however, that the appellant previously had stated he waived his rights and was willing to give a statement to the police. He had given a statement, responded that he did have money and attempted to explain how he got it. When Detective Levos asked about the stains, the appellant did not answer. Detective Levos' comment at trial was in passing and was a description of all the circumstances. The comment by the police officer here was also not emphasized by the prosecutor.

[9] The testimony was:

> Henry, I interviewed your wife on the morning of the 16th, and I don't think she was lying to me, but she told me that she hadn't seen you since about 9:30 or 9:45 the night before, when you came home from your mother's. You got a ride home from your mother's, and she went to bed and you went out. She told me that she did not see you since.

[10] NRS 49.295 (1) provides in pertinent part:

(a) A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent.

(b) Neither a husband nor a wife can be examined, during the marriage or afterwards, without the consent of the other, as to any communication made by one to the other during the marriage.

[11] It is significant that the challenged statements here came near the end of the interview after the appellant had given the police virtually all of the inculpatory information.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Herbert F. AHLSWEDE, Clark County County Deputy Public Defender on relation of Henry Deutscher,	)
Petitioner/Appellant,	)
v.	)
Charles WOLFF, Director, Department of Prisons, and Robert Lippold, Superintendent, Maximum Security Prison,	)
Respondents-Appellees.	)

No. 82-5831

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 16, 1983.

Decided Nov. 22, 1983.

Before CHOY and NORRIS, Circuit Judges, and NIELSEN,* District Judge

PER CURIAM:

Henry Deutscher was convicted of murder and robbery in Nevada state court. His conviction was affirmed on appeal. Deutscher v. State, 95 Nev. 669, 601 P.2d

407 (1979). Deutscher now appeals the district court's denial of habeas corpus relief.

[1] Deutscher changed lawyers between the time the district court denied habeas relief and the time this appeal was filed. The new lawyers would have us remand the case pending a determination by the state courts of other issues they are now raising. Although the "total exhaustion" rule requires a district court to dismiss a habeas petition containing both exhausted and unexhausted claims, Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir.1983), that rule does not apply to claims not presented in the petition. There is no mixed petition before us, as the only issues properly before this court are those in the petition. Robinson v. Wade,

686 F.2d 298, 304 & n. 12 (5th Cir.1982); Miller v. Turner, 658 F.2d 348, 350 (5th Cir.1981); see Engle v. Issac, 456 U.S. 107, 124 n. 25, 102 S.Ct. 1558, 1569, 71 L.Ed.2d 783 (1982).

[2] Deutscher contends that the lack of a speedy arraignment prejudiced him because he would have been released, if arraigned on the same day, for lack of probable cause. He is essentially saying that no probable cause existed at the time of arrest. Deutscher had a full and fair opportunity to litigate his fourth amendment claims before the state supreme court. Habeas corpus relief on this ground is therefore precluded. Stone v. Powell, 428 U.S. 465, 481-82, 96 S.Ct. 3037, 3046, 49 L.Ed.2d 1067 (1976); Myers v. Rhay, 577 F.2d 504, 508-09 (9th Cir.), cert. denied, 439 U.S. 968, 99 S.Ct. 459, 58 L.Ed.2d 427 (1978).

[3] Deutscher claims that the delay in arraignment produced his confession, requiring suppression of the confession under the McNabb-Mallory rule or a parallel state rule, Nev.Rev.Stat. § 171.178. The McNabb-Mallory rule is a rule of federal criminal procedure, so it is not cognizable on a petition for habeas corpus. See 28 U.S.C. § 2254(a). The decision of the Nevada Supreme Court controls as to any rights Deutscher might have under Nev.Rev.Stat. § 171.178.

[4] Deutscher argues that he was not allowed on cross-examination to elicit the residence address of a detective testifying for the prosecution. Disclosure of the residence address was unnecessary because Deutscher had ample information to identify the witness with his environment. United States v. Fife, 573 F.2d 369, 376-77 (6th Cir.1976), cert. denied, 430 U.S. 933, 97 S.Ct.

1555, 51 L.Ed.2d 777 (1977); United States v. Alston, 460 F.2d 48, 51-53 (5th Cir.), cert. denied, 409 U.S. 871, 93 S.Ct. 200, 34 L.Ed.2d 122 (1972). The witness gave his true name and occupation, described his professional background, and fully described his involvement with Deutscher.

[5] A detective remarked during a videotaped interrogation that Deutscher's wife had said he was not home that night Deutscher complains that these remarks were hearsay erroneously admitted. There was other undisputed inculpatory evidence concerning Deutscher's whereabouts on the night of the murder. The error is harmless beyond a reasonable doubt, which precludes habeas corpus relief, see, e.g., Olsen v. Ellsworth, 438 F.2d 630, 631 (9th Cir.1971), cert. denied, 405 U.S. 1040, 92 S.Ct. 1319, 31 L.Ed.2d 580 (1972).

[6] Deutscher asserts infringement of his right against self-incrimination because the prosecutor elicited testimony that Deutscher did not respond when asked about how two blood-stained $50 bills in his wallet became stained. Upon objection, the trial court struck the reference to the defendant's silence and admonished the jury accordingly. There is also other, overwhelming evidence of guilt in the record. The error, if any, was harmless. United States v. Skinner, 667 F.2d 1306, 1310 (9th Cir.1982); United States v. Wycoff, 545 F.2d 679, 682 (9th Cir.1976), cert. denied, 429 U.S. 1105, 97 S.Ct. 1135, 51 L.Ed.2d 556 (1977).

[7] Deutscher complains of two closing remarks made by the prosecutor which seemed to refer to Deutscher's silence at trial. Neither remark was manifestly intended as, nor was of such

character that the jury would naturally and necessarily take it to be, a comment on the failure to testify. United States v. Fleishmen, 684 F.2d 1329, 1343-44 (9th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 464, 74 L.Ed.2d 614 (1982); United States v. Polizzi, 500 F.2d 856, 890-91 (9th Cir. 1974), cert. denied, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975).

[8] Deutscher argues that the trial court lacked jurisdiction to convict him because Las Vegas lies outside the state boundaries as set forth in the Nevada Constitution. The federal act ceding the land which contains Las Vegas stated that the land would become a part of Nevada when the state, through its legislature, consented. Act of May 5, 1966, ch. 73 § 2, 14 Stat. 43, 43. The state legislature did consent. See Surianello v. State, 92 Nev. 492, 553 P.2d 942, 949

(1976). Under the Supremacy Clause, Las Vegas is within Nevada notwithstanding the Nevada Constitution.

[9,10] Finally, Deutscher urges that he was denied due process because at the penalty phase of trial the jury was instructed on "rape" and "attempted rape" under a statute which had since been repealed and substituted with a "sexual assault" statute. Act of May 20, 1977, ch. 598, 1977 Nev.Stat. 1626. This court will not grant relief in habeas corpus unless the erroneous jury instructions rendered the trial so fundamentally unfair as to deny due process. Myers v. Rhay, 577 F.2d 504, 511 (9th Cir.), cert. denied, 439 U.S. 968, 99 S. Ct. 459, 58 L.Ed.2d 427 (1978); Egger v. United States, 509 F.2d 745, 749 (9th Cir.), cert. denied, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 61 (1975). The new statute defines sexual assault more broadly than

does the old statute on rape. Any error committed was to Deutscher's benefit.

AFFIRMED.

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*The Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, setting by designation.

APPENDIX G

IN THE SUPREME COURT OF THE

STATE OF NEVADA

HENRY DEUTSCHER, Appellant, v. WARDEN, NEVADA STATE PRISON, Respondent.	)	No. 16901

September 4, 1986 724 P.2d 213

OPINION

PER CURIAM:

Appellant Henry Deutscher appeals from the denial of his second petition for post-conviction relief.

Henry Deutscher was convicted of first degree murder and robbery and sentenced to death and fifteen consecutive years in prison. On October 18, 1979, this court affirmed Deutscher's conviction and sentence. See Deutscher v. State, 95 Nev. 669, 601 P.2d 407

(1979). Deutscher then petitioned the U.S. district court for a writ of habeas corpus. The U.S. district court ordered Deutscher to petition the Nevada district court for post-conviction relief. He did so. The Nevada district court denied Deutscher post-conviction relief. This court dismissed Deutscher's appeal from the Nevada district court's denial of post-conviction relief. The U.S. district court thereafter denied Deutscher habeas corpus relief.

Deutscher was represented in foregoing proceedings by the public defender's office. After the U.S. district court denied Deutscher habeas corpus relief, Deutscher's present counsel replaced the public defender as Deutscher's counsel.

Deutscher then unsuccessfully appealed the U.S. district court's denial of habeas corpus relief. Ahlswede v.

Wolff, 720 F.2d 1108 (9th Cir. 1983), cert. denied, 106 S. Ct. 225 (1984). On May 18, 1983, Deutscher again petitioned the Nevada district court for post-conviction relief for a second time. The district court held an evidentiary hearing. The district court found that Deutscher had not been denied effective trial or appellate counsel. The district court also found that Deutscher had not shown good cause for his failure to file his petition within one year of this court's resolution of his direct appeal, NRS 177.315(3),[1] or to raise on direct appeal or in his first petition for post-conviction relief, NRS 177.375(2),[2] his remaining eleven assignments of error. Finally, the district court found that Deutscher's remaining eleven assignments of error were meritless. The district court denied Deutscher's second petition for post-conviction relief.

Deutscher argues on appeal that the district court erred in denying his second petition for post-conviction relief. We disagree. The district court correctly found that Deutscher had not been denied effective trial or appellate counsel. Strickland v. Washington, 466 U.S. 668 (1984). The district court also correctly found that Deutscher had not shown good cause for it to address his remaining eleven assignments of error. NRS 177.315(3); NRS 177.375(2). We, therefore, affirm the district court's denial of Deutscher's second petition for post-conviction relief.

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[1] NRS 177.315(3) (emphasis added) provides:

> Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, shall be filed within 1 year following entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year from the final decision upon or pursuant to the appeal.

[2] NRS 177.375(2) (emphasis added) provides, in pertinent part:

> If the petitioner's conviction was the result of a trial, all claims for post-conviction relief are waived which were or could have been:
>
> . . .
>
> (b) Raised in a prior petition for post-conviction relief; or raised in any other proceeding that the petitioner has taken to secure relief from his conviction or sentence, unless the court finds good cause shown for the failure to present such claims.

APPENDIX H

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Henry DEUTSCHER, Petitioner, v. Harol WHITLEY, Warden of the Nevada State Prison, and Brian McKay, Attorney General of the State of Nevada, Respondents.	Case No. CV-N-86-445-ECR

Oct. 22, 1987.

EDWARD C. REED, Jr., Chief Judge.

The Court, by its order of June 26, 1987, 663 F.Supp. 793 (D.Nev.1987), held that the petitioner has not established cause and prejudice to excuse his procedural default on counts 2, 3, 5, 6, 9, and 10 of the habeas corpus petition. The Court had held a hearing, and had received evidence on the question of whether the petitioner's trial counsel's failure to raise these various claims in

the state courts amounted to ineffective assistance of counsel. The Court found, in essence, that these six claims were in an evolving state at the time of the petitioner's trial, and that counsel was not derelict in his duty for failing to assert these arguments at the state level.

The Court did find that state trial counsel was ineffective in failing to raise the Witherspoon claim contained in count 8 of the petition. The Court found that that claim had developed to the point that all reasonably competent counsel would have at least considered the issue when defending a death penalty case. In view of the fact that the petitioner's trial counsel admitted that he had not ever considered raising the issue, the Court found that cause and prejudice existed to excuse the

petitioner's procedural default on this matter in the state courts.

Both the petitioner and the respondents have filed motions to reconsider the Court's order. The petitioner argues that the Court has failed to consider the novelty of the six claims when finding that no cause and prejudice existed to excuse the petitioner's procedural default. The respondents, on the other hand, take issue with the Court's finding of prejudice with respect to count 8 of the petition. Neither motion states a proper basis for this Court to reconsider its previous order, and both motions will be denied.

PETITIONER'S MOTION TO RECONSIDER

[1,2] The petitioner, in his motion to reconsider, contends that the Court failed to consider his arguments regarding the novelty of the six claims

before they were dismissed on procedural default grounds. There is no doubt that novelty is an appropriate means of establishing cause and prejudice to excuse procedural default. See Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). The problem with the petitioner's assertion of novelty in this case is that the issue is apparently being raised for the first time in the motion to reconsider. The Court has reviewed the petitioner's opposition to the motion to dismiss, and all of the pleadings on file with respect to cause and prejudice and procedural default. It appears to the Court that the petitioner's only argument with respect to cause and prejudice was the alleged ineffectiveness of the trial counsel. The Court does not find that novelty was ever properly placed before the Court for its decision. Even if

novelty had been stated somewhere in the pleadings, it is counsel's obligation to present issues completely and properly to the Court for their disposition. Raising matters for decision in motions to reconsider is not the proper manner to proceed in this Court.

[3] It also appears that novelty claims cannot be supported by the facts of this case. In Smith v. Murray, supra, the latest statement of the novelty doctrine, the Supreme Court restricted the scope of the doctrine as it had been stated in Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In the Smith case, the petitioner had been convicted of murder in Virginia state courts. During the investigation of the crime, the petitioner made incriminating statements to a state psychiatrist which were later introduced into evidence against him. Although trial counsel

objected to the introduction of the evidence at trial, he did not raise the issue as error on appeal. Id., 106 S.Ct. at 2666. When the petitioner attempted to raise the issue in a petition for a federal writ of habeas corpus, the lower courts found that the argument was precluded by procedural default. The petitioner contended, however, that cause and prejudice were present in the case, as trial counsel was ineffective for failing to consider the claim, and that the claim was so novel that the claim was not available to counsel at that time. Id.

The Supreme Court upheld the lower courts' dismissal of the petition. After finding that no ineffective assistance of counsel could be established on these facts, the Court concluded that the petitioner also had not established a claim of novelty. Although the Court

noted that the Reed Court had found novelty to exist where the basis for the constitutional claim was not "reasonably available" to counsel, the Court in Smith found it had to reconcile this rule with Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). In so doing, the Court concluded that the question with respect to novelty of claims is "whether at the time of the default the claim was 'available' at all." Id., at 2667. In view of the fact that various forms of the claim which the petitioner now hoped to assert were "percolating" in the lower courts at the time of the petitioner's original appeal, the Court concluded that the petitioner could not contend that the legal bases of this claim were unavailable to the petitioner's attorney. The Court thus affirmed the dismissal of the petition.

In this case, it also appears that the legal bases for the claims which the petitioner hopes to assert were not so unavailable that they must be considered novel. The petitioner's own expert witness testimony at the evidentiary hearing proves this beyond doubt. At that hearing, Mr. Ford, the petitioner's expert, testified that the "tools" for the development of all of these claims were in existence at the time of the petitioner's original appeal. It was Mr. Ford's testimony that all of these claims, much as the claim in Smith, had been "percolating" in the lower courts for quite some time, and that any competent counsel would have therefore raised the issues. This Court agreed with the expert that the tools for the development of the claims were present at that time, but found that petitioner's counsel had not been ineffective in

failing to raise them. As in Smith, the fact that these claims were "percolating" in the lower courts at the time of the appeal is not sufficient to find that they were unavailable to the petitioner at the time of his original appeal. The claims of novelty are thus without support.

[4] The petitioner makes much of the fact that the Court's previous order found several of these claims to have been not reasonably available to the petitioner's counsel. This argument is of little concern to the Court. Initially, the Court made those findings with respect to counsel's obligation to assert a matter on appeal. That a claim was not so firmly entrenched in death penalty jurisprudence that reasonably effective counsel should have raised the issue does not automatically indicate that the issue was so unavailable at that

time as to be novel for purposes of cause and prejudice. In addition, the standard for novelty, as developed in Smith is not whether the claim was reasonably available to counsel, but instead whether the claim was available at all. As indicated above, the evidence in this case indicates that these claims were available to a certain extent, but that they were not so well established that counsel should have necessarily raised them. The petitioner's motion for reconsideration will therefore be denied.

RESPONDENTS' MOTION FOR RECONSIDERATION

[5] The respondents contend that the Court failed to consider the state trial record when finding that the petitioner's trial counsel was ineffective for failing to consider the Witherspoon issue presented in count 8 of the petition. This motion is the result of the respondents' misunderstanding of

the role of prejudice in procedural default. As the Court stated in its previous order, prejudice for purposes of procedural default exists where the claim which the petitioner seeks to assert has a reasonable probability to free him from the allegedly unlawful restraint on his freedom. Thus, the Court found in the previous order that the petitioner could not demonstrate prejudice with respect to count 7 of the petition regarding race discrimination in capital sentencing. As the Supreme Court made clear in McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), such an argument does not constitute grounds to vacate an otherwise lawfully imposed death sentence. Even if counsel had been ineffective in failing to raise the race issue, therefore, the fact that the claim could never void the death sentence

prevented it from filling the prejudice plank.

Prejudice was found to exist with respect to count 8 because the Witherspoon claim, if it is ultimately established, may void the petitioner's sentence of death. As noted above, however, the Court need not review any of the state trial record to determine whether prejudice exists. The determination is purely a matter of law, and focuses upon the strength of the particular legal doctrine, not upon the petitioner's ability to establish a violation of the doctrine in this case. The Court will now be required to look into the record to establish whether a Witherspoon violation has indeed occurred, but the fact that it did not do so in the cause and prejudice stage of this case is not a basis for the Court to reconsider its previous order.

IT IS, THEREFORE, HEREBY ORDERED that the petitioner's motion to reconsider is DENIED.

IT IS FURTHER ORDERED that the respondents' motion to reconsider is DENIED.

APPENDIX I

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Henry DEUTSCHER, Petitioner, v. Harol WHITLEY, Warden of the Nevada State Prison, and Brian McKay, Attorney General of the State of Nevada, Respondents.	Case No. CV-N-86-445-ECR

June 25, 1987.

ORDER

EDWARD C. REED, JR., Chief Judge.

On May 11, 1987, the Court heard oral argument and received evidence regarding the cause and prejudice showing required to overcome the petitioner's procedural default in the state courts. By its order of April 1, 1987, the Court held that nine counts in the petition were potentially barred by virtue of

procedural default, and ordered that a hearing be held to determine the existence of cause and prejudice.*

The procedural facts of this case were set forth fully in the Court's order of November 19, 1986, and will not be restated at length here. Suffice it to say for present purposes that the respondents have argued that nine of the claims in the present petition are procedurally barred by virtue of the petitioner's failure to raise them in his direct appeal to the state supreme court or in the first state post-conviction relief proceeding. As stated in the Court's April order, the state supreme court refused to consider these claims on precisely that basis. The petitioner argues, on the other hand, that cause and prejudice exist to excuse that default, as his appellate counsel at the time, Public Defender Ahlswede, was ineffective

in failing to raise these issues at the proper time. On this basis, the petitioner contends that the Court should excuse the procedural default, and should reach the merits of these claims.

DISCUSSION

[1] As an initial matter, ineffective assistance of appellate counsel can constitute cause for purposes of Wainwright. Murray v. Carrier, ___ U.S. ___, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397 (1986). The petitioner must show that his appellate counsel was deficient under the two part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in order to demonstrate that cause exists to excuse his procedural default. Thus, the petitioner must show that his counsel made errors so serious that he was not rendering the petitioner reasonably effective assistance. Id., at

687, 104 S.Ct. at 2064. Further, the petitioner must also show that counsel's failure to render reasonably effective assistance resulted in prejudice to the petitioner's case. Id., at 694, 104 S. Ct. at 2068. The petitioner must demonstrate under this plank that the attorney error resulted in a reasonable probability that the outcome of the proceeding would have been different had the error not occurred. Id. Once the two part test of Strickland is established, cause is made out, and the Court must then turn to the analysis of prejudice under Wainwright.

[2] Under this test, which is similar to the prejudice test in Strickland, the Court must determine whether the claim which would otherwise be excluded by the procedural default has a reasonable probability of affecting the outcome of the petitioner's case. This

analysis does not focus on the petitioner's ability to prove the facts necessary to prove the claim. It focuses instead on the legal issue involved. If that particular claim could reasonably free the petitioner of the restraints imposed upon him by his conviction, then prejudice is demonstrated. Thus, it is clear that the various claims must be measured against currently prevailing legal standards in determining whether the prejudice is present, for only the currently prevailing law can set the petitioner free. What the law was at the time these claims should have been raised by petitioner's counsel is therefore irrelevant. Under the above test, it appears that only one of the claims at issue should be heard on the merits, as cause and prejudice exist to excuse procedural default in the state courts for only that claim.

[3] As an initial matter, the petitioner's evidence consisted mostly of testimony of his expert, Timothy Ford. Mr. Ford is a licensed attorney in the state of Washington, and practices primarily in death penalty cases. In Mr. Ford's opinion, at the time of the petitioner's sentencing in this case, counsel would have necessarily been ineffective if he had tried to put on a penalty phase defense without first contacting other counsel. This was the era immediately following Furman, and Ford's opinion was that very few attorneys in the country had ever put on a penalty phase defense. Therefore, he concluded, no attorney should have tried to "go it alone," as the nature of the penalty phase defense was so unusual and foreign that most attorneys had no facility for it at that time. By attempting to put on the petitioner's

penalty phase defense himself without seeking outside help from an experienced attorney, Ford contends that Ahlswede's representation of the petitioner was per se deficient.

The Court is unwilling to accept the proposition that counsel is automatically ineffective for failure to associate outside counsel for the penalty phase. If this were true, no lawyer would be competent to represent a defendant in the time period following a new Supreme Court decision that breaks with precedent. It seems that any attorney should be able to read the existing cases, and to determine what types of evidence and argument should be put forth at a penalty phase hearing without having to bring in outside help. Failure to prepare adequately for the penalty phase would constitute ineffective assistance. Simply failing to associate outside

counsel, in and of itself, does not equate to a Strickland violation.

Ahlswede's failure to contact other counsel, therefore, does not automatically establish ineffective assistance of counsel. The possibility remains, however, that the manner in which he did conduct the petitioner's penalty phase defense violated Strickland. In this regard, the petitioner claims that Ahlswede's failure to consider or investigate the remaining claims violated his obligation to render reasonably effective assistance of counsel.

COUNT ONE

As stated above, this particular claim is not itself the subject of procedural default, as the state supreme court did reach the merits of the substantive ineffective assistance of counsel claim. The remainder of Count

One, namely, the ineffective assistance of appellate counsel claim, will be discussed as it affects each individual claim.

COUNTS TWO, THREE, FIVE, & SIX

[4] It appears to the Court that all these counts must fall victim to the procedural default in the state courts, in that the petitioner has failed to show that appellate counsel was ineffective for failing to raise them on the first direct appeal to the state supreme court, or in the first state post-conviction relief procedure. Count Two, for example, deals with the intent necessary for the imposition of the death penalty. Specifically, the petitioner argues that no such penalty may be inflicted in the absence of a direct finding by the jury of the intent to kill. In cases such as this, where the death sentence has been imposed on a finding of felony murder,

and where no direct finding of the intent to kill has been made, the petitioner argues that the death penalty is improper.

Appellate counsel, Mr. Ahlswede, did not raise this claim at any time before the Nevada courts. Mr. Ford testified at the evidentiary hearing that the law regarding the intent requirement was in a developing stage at the time of Ahlswede's representation, but that the "tools" were present in the cases from which one could have fashioned such an argument. Specifically, Ford stated that Justice White's concurrence in Lockett v. Ohio, 438 U.S. 586, 624, 98 S.Ct. 2954, 2983, 57 L.Ed.2d 973 (1978), indicated that intent to kill might be constitutionally required. In addition, Ford testified that various state supreme court cases at that time held that the death penalty could not be imposed for

rape or against the "non-trigger man" on a felony murder conviction. See Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). From these antecedents, Mr. Ford argued that he would have advised raising the intent issue in any felony murder case after 1978, and that Mr. Ahlswede's representation was thus ineffective for failure to do so.

Similarly, Mr. Ford contended that Ahlswede erred in failing to raise in the state proceedings the contentions currently contained in Count Three. In this count, the petitioner contends that the prosecutor improperly argued during the sentencing phase that intoxication was not to be considered as a mitigating circumstance. Ford stated during the evidentiary hearing that at the time of the sentencing in this case, there were a number of California state cases from

lower and intermediate courts which rejected this type of prosecutorial argument. Ford conceded that it was not until the early 1980s that this type of improper argument was raised as a federal constitutional issue. Nonetheless, Ford felt that the "tools" for the argument were present, and that Ahlswede was ineffective for failing to raise this claim.

In addition, Ford testified that Ahlswede was ineffective for failing to contest the constitutionality of redundant aggravating circumstances. This argument, which is contained in Count Five of this petition, was in its early stages at the time of the petitioner's conviction. It was first raised, apparently, in Provence v. Florida, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), and in State v.

Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). It is not clear from the testimony presented at the hearing when, if ever, this argument gained recognition in the federal courts. On the basis of the two state supreme court cases, however, Mr. Ford still contends that counsel should have been aware of the argument at the time of the appeal in this case, and that failure to raise the point constituted the ineffective assistance of counsel.

Ford also testified at the hearing that Mr. Ahlswede gave ineffective assistance of counsel when he failed to raise the arguments regarding the burden of proof contained in Count Six. Once again, Mr. Ford indicated that no case had specifically held that the burden of proof in capital sentencing had to be beyond a reasonable doubt at the time of

the petitioner's first appeals. Instead, Ford testified that the "tools" with which to make such an argument were in existence at the time. Relying on Lockett, supra, pg. 797, and In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), Mr. Ford argued that anyone could have developed this argument during the relevant time frame. As far as the actual authorities went at that time, however, Ford did indicate that the cases were in a developing stage, and that no court had specifically held on this matter until State v. Wood, 648 P.2d 71 (Utah 1981) cert. denied, 459 U.S. 988, 103 S.Ct. 341, 74 L.Ed.2d 383 (1982). Based on the existing precedent at the time of the first appeals, Ford still testified that Ahlswede's assistance was ineffective for failing to raise this claim.

It is difficult to see how Mr.

Ahlswede's failure to raise these claims constitutes ineffective assistance of counsel. It has long been held that counsel does not have a duty to raise every possibly conceivable claim. In Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), for example, the Court indicated that a deliberate choice by counsel not to press a certain colorable constitutional claim regarding prosecutorial misconduct did not constitute ineffective assistance of counsel, where counsel had researched a number of claims and had decided that the prosecutorial claim was not worth pursuing. Id., 106 S.Ct. at 2667. In addition, the Court also noted that even "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural

default." Id., (citing Murray v. Carrier, 106 S.Ct. 2639, at 2641 (1986) and Engle v. Issac, 456 U.S. 107, 133-34, 102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783 (1982)). Therefore, where counsel has vigorously pursued claims which he feels have merit, but has left out other colorable claims, either deliberately or because of failure to recognize the legal basis for the claim, no ineffective assistance of counsel claim will lie. See also Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), aff'd on rehearing, 731 F.2d 1486 (1984), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984) (counsel's failure to advance errors on appeal later gaining judicial recognition does not constitute ineffective assistance of counsel); Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), cert. denied, 464 U.S. 922, 104 S.Ct. 290, 78 L.Ed.2d 266

(1983); Songer v. Wainwright, 571 F.Supp. 1384, 1403 (M.D. Fla.1983).

In this case, Mr. Ahlswede testified that he raised all claims which he felt were worthy and had merit. He freely admitted that the contentions contained in Count Two, Three, Five, and Six of the current petition simply never occurred to him. Whereas the petitioner claims that this failure constituted ineffective assistance, it appears that Ahlswede's assistance was not ineffective.

First, and foremost, all of these claims were in their early stages of development as constitutional issues when the petitioner's first appeals began. As such, it is not surprising that Mr. Ahlswede did not recognize the legal basis for the arguments, inasmuch as they simply did not exist as matters of federal constitutional law. Ahlswede's representation cannot be said to be

constitutionally defective for failure to invent the claims himself. Alvord, supra, pg. 798. In addition, the fact that some of these claims later gained judicial recognition is not relevant. As noted in Alvord, the later recognition of an argument does not cast aspersions onto the failure of counsel to envision the future. Thus, it does not appear that Ahlswede rendered ineffective assistance of counsel when he failed to recognize these four claims. As the Court stated in Murray, supra, pg. 798, the mere failure to recognize the legal basis for a claim does not constitute ineffective assistance of counsel. In this case, Ahlswede failed to recognize the legal basis for claims that were only just then beginning to coalesce out of the cases. If the failure to recognize established claims will not always constitute ineffective assistance, see Murray,

supra, then the failure to recognize claims which are still in their embryonic state must not be constitutionally suspect. These four claims must therefore be barred by procedural default, as there is not cause and prejudice to avoid the consequences of Wainwright.

COUNT SEVEN

[5] This claim urges that the sentence of death was improperly imposed against the petitioner, in view of the fact that the penalty is discriminatorily enforced against poor defendants, male defendants, and defendants accused of killing white women. It appears that no cause and prejudice exists to excuse the procedural default for this claim either.

As the Supreme Court has recently noted, claims of racial bias in the enforcement of the death penalty cannot be the basis for overturning such a

sentence. McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1766, 95 L.Ed.2d 262 (1987). The Court also noted that membership in other minority groups and gender identification were both irrelevant in determining whether the sentence of death had been properly imposed. Id. Thus, the fact that the petitioner is a poor white male, convicted of murdering a white female is simply not relevant to the constitutionality of his death sentence, according to the McCleskey case. Therefore, even if the petitioner had presented this claim in a timely manner, it would fail to secure him relief from his conviction and sentence. In that this claim cannot afford him relief, there is no prejudice for either the Strickland or Wainwright test, and it will not be considered further in this petition.

COUNT EIGHT

It does appear, however, that cause and prejudice have been met for Count Eight. In this claim, the petitioner argues that jurors were impermissibly excluded from the jury because of their reservations about the death penalty. Petitioner does not contend that no juror can never be excluded for such reservations. Rather, he argues that these particular jurors were not asked the proper questions on voir dire as required by Witherspoon v. Illinois, 391 U.S. 510, 520, 88 S.Ct. 1770, 1776, 20 L.Ed.2d 776 (1968).

[6] It appears, as an initial matter, that the Strickland test is met for this count. The Witherspoon case was well entrenched within the annals of capital sentencing jurisprudence by the time of the petitioner's conviction, having been denied ten years earlier. It

thus appears to the Court that any competent counsel should have at least considered this claim before winnowing it out. In this case, however, Mr. Ahlswede testified that he did not even think about the Witherspoon issue when writing the first appellate briefs. In view of the significance and popularity of this particular argument, it seems that any effective counsel would have at least considered the claim, and would probably have raised it.

[7] In addition, counsel's failure to raise this claim appears to have prejudiced the petitioner, both for Strickland and Wainwright purposes. As noted above, "cause" focuses on the legal force of the argument, not on the petitioner's ability to plead facts to make out the argument. If the claim advanced would free the petitioner from the restraints of his conviction, then he

has been prejudiced if the claim has not been advanced on his behalf. In this case, a Witherspoon claim would possibly free the petitioner of his impending sentence of death and would cause him to be re-sentenced. Id. Because a successful Witherspoon claim would so free him, prejudice exists for this claim.

COUNT NINE

[8,9] In this count, the petitioner contends that the state supreme court failed to conduct properly the proportionality review as is required by Nevada law. See NRS § 177.055. As an initial matter, it is clear that proportionality reviews, as such, are not required by the Constitution. See McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987); Pulley v. Harris, 465 U.S. 37, 43, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984).

Failure to conduct such a review thus cannot be in and of itself the basis for federal habeas corpus relief. Id. In addition, it is equally clear that federal habeas relief cannot lie for the state's failure to comply with its own procedures. See 28 U.S.C. § 2254(a). The state's failure to conform to its own requirements for proportionality reviews are thus also not subject to federal habeas review. Thus, the only possibly cognizable claim in this count is that the state's proportionality review creates a liberty interest, and that the state's failure to conduct properly the review deprived him of that liberty interest without due process of law.

[10] This claim must fail for the same reasons as Counts Two, Three, Five, and Six. The state's procedure for proportionality review may indeed create some sort of liberty interest, but the

relevant question here is whether Mr. Ahlswede's counsel was ineffective for failing to recognize that fact at the time of the first appeals in this case. The petitioner has not presented the Court with any evidence which indicates that effective counsel would have recognized and raised this issue at that time. Indeed, the Court has been unable to find any case law from any jurisdiction which supports this theory. If this claim were properly before the Court, this theory would be given full consideration. It appears, however, that Mr. Ahlswede's representation was not constitutionally defective for failing to invent this claim seven years earlier. Count Nine will also not be considered further in this case.

COUNT TEN

In Count Ten of the petition,

Deutscher argues that hearsay evidence and bad acts evidence was admitted at his penalty phase hearing in violation of his due process rights. Specifically, the petitioner argues that NRS § 200.033 allows the introduction of proof of a prior conviction, but that that statute does not allow any other type of evidence regarding the first conviction to be admitted. In this case, both the victim of the prior crime and a police officer who had worked on that case were allowed to testify about the offense. The petitioner argues that he was prejudiced because of this testimony.

[11] As an initial matter, it is clear that the states can introduce hearsay and bad acts evidence in a penalty phase hearing and remain within the bounds of the Constitution. Spencer v. Texas, 385 U.S. 554, 560, 87 S.Ct. 648, 651, 17 L.Ed.2d 606 (1967); see also

Marshall v. Lonberger, 459 U.S. 422, 436, 103 S.Ct. 843, 851, 74 L.Ed.2d 646 (1983). Petitioner does not debate this point. Rather, he contends the type of evidence used (the testimony of the victim and the police officer as compared to a certified copy of conviction) resulted in a due process violation, and that Ahlswede was ineffective for not raising the claim on the first appeals.

[12] It appears to the Court that Ahlswede's conduct regarding this claim does not constitute ineffective assistance of counsel. First, and foremost, the standards regarding due process violations and evidence were only in a rudimentary state of development at the time in question. The fact that this was not a common or well developed claim tends to support Ahlswede's effectiveness. Petitioner's citation to Gardner v. Florida, 430 U.S. 349, 97

S.Ct. 1197, 51 L.Ed.2d 393 (1977), is unavailing, in that this case holds merely that all facets of the penalty phase hearing must comport with due process. The case does not discuss admission of evidence in any respect. This particular claim, therefore, appears to have been fairly undeveloped at that time.

In addition, the standards which have evolved regarding evidence and due process indicate that the claim is extraordinarily difficult to prove. Hobbs v. Lockhart, 791 F.2d 125, 128 (8th Cir. 1986) (evidence must be so conspicuously prejudicial or of such a magnitude that it fatally infected the trial and deprived the defendant of fundamental fairness). Counsel in this case did file a variety of appellate and post-conviction briefs on the petitioner's behalf. In the course of

preparing those petitions, he naturally weeded out the stronger claims from the weaker ones. That he failed to assert this claim, which would have been extremely difficult to prove, does not constitute ineffective assistance of counsel. There is thus no cause to excuse the petitioner's procedural default on Count Ten as well, and it will not be considered further in this matter.

IT IS, THEREFORE, HEREBY ORDERED that Counts Two, Three, Five, Six, Seven, Nine, and Ten shall be dismissed from the current petition, as the petitioner has failed to demonstrate cause and prejudice to excuse his procedural default on these claims in state court.

IT IS FURTHER ORDERED that Count Eight shall remain part of this petition, in view of the fact that Mr. Ahlswede was ineffective for not raising the claim during the first appellate remedies.

*The counts in the petition subject to procedural default were found to be 1, 2, 3, 5, 6, 7, 8, 9, and 10. There was confusion as to why Count 1 was included in the order, as the state supreme court did reach the merits of the ineffective assistance of trial counsel claim in the second state post-conviction relief proceeding. As noted in the April order, where the state supreme court reaches the merits of a claim, the state's reliance on procedural default in the federal habeas proceedings is precluded. April order, slip op. at 4. Because the state supreme court reached the merits of the ineffective assistance of trial counsel, this portion of Count 1 is not subject to procedural default.

The remainder of Count 1 contains the allegations regarding ineffective assistance of appellate counsel. These claims were included in the petition by present counsel, apparently, to anticipate and rebut the impending claim of procedural default by respondent's counsel. In view of the fact that petitioner attempts to establish cause and prejudice by pointing to his former appellate counsel's ineffectiveness this portion of the claim was at issue at the May hearing.

APPENDIX J

28 U.S.C. § 2244(b):

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier

application deliberately withheld the newly asserted ground or otherwise abused the writ.

APPENDIX K

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts:

Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.